AMERICAN ARBITRATION ASSOCIATION
MICHIGAN EMPLOYMENT ARBITRATION CASE LAW UPDATE
JUNE 21, 2023
LEE HORNBERGER
ARBITRATOR AND MEDIATOR

I. INTRODUCTION

This update reviews significant Michigan cases issued since 2008 concerning arbitration. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

The YouTube video of the author's 2021-2022 update presentation is at:

www.youtube.com/watch?v=kZpATRmGCcQ

The YouTube video of the author's 2020-2021 update presentation is at:

https://www.youtube.com/watch?v=9Q7deVlExDI

The YouTube video of the author's 2019-2020 update presentation is at:

https://www.youtube.com/watch?v=I0TkP8zs-A8

II. ARBITRATION

A. Michigan Supreme Court Decisions

Supreme Court reverses COA concerning shortened limitations period.

McMillon v City of Kalamazoo, ___ Mich ___, 983 NW2d 79, MSC 162680, COA 351645 (Jan 11, 2023).

Plaintiff applied for job with City of Kalamazoo in 2004. She completed application and underwent testing and background check, but she did not get job. In 2005, City contacted her about a job as Public Safety Officer, and she was hired. She did not fill out another application in 2005. In 2019, Plaintiff sued City, alleging discrimination, retaliation, and harassment in violation of Elliott-Larsen CRA and Persons with Disabilities CRA. City moved for summary disposition, relying in part on provision in application Plaintiff had signed in 2004 that had nine-month limitations period. Circuit Court granted City's motion for summary disposition. COA affirmed in unpublished opinion. Supreme Court ordered oral argument on application to address whether: (1) *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held limitations clauses in employment applications are part of binding employment contract; (2) Appellant is bound by terms of document that states "this … is not a contract of employment," *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405 (1996); (3) contractual limitations clauses that restrict civil rights claims violate public policy, *Rodriguez v Raymours Furniture Co, Inc*,

225 NJ 343 (2016); and (4) these issues are preserved. *Mich Gun Owners, Inc v Ann Arbor Pub Schs*, 502 Mich 695, 708-709 (2018).

After hearing oral argument on application for leave to appeal, in lieu of granting leave to appeal, Supreme Court reversed that part of COA judgment affirming summary disposition for defendant based on shortened nine months limitations period in employment application, vacated remainder of COA judgment, and remanded case to Circuit Court for further proceedings. Circuit Court and COA held lawsuit barred by nine month limitation period. Supreme Court held there is genuine issue of material fact whether plaintiff had notice of use of prior application materials' future employment-related terms and whether she agreed to be bound by those materials. **City had not sufficiently demonstrated that parties had mutuality of agreement to be entitled to summary disposition.** Without mutuality of agreement, there can be no contract. Justice Welch, concurring, would have ruled on whether *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held limitations clauses in employment applications are part of binding employment contract.

https://www.courts.michigan.gov/48e075/siteassets/case-documents/uploads/sct/public/orders/162680_59_01.pdf

https://www.courts.michigan.gov/courts/supreme-court/case-information-2022-2023-term/2022-october-case-information/162680-lakisha-mcmillon-v-city-of-kalamazoo/

Supreme Court vacates COA and remands cases to Circuit Courts for reconsideration of whether plaintiffs' claims are subject to arbitration.

Lichon v Morse, 507 Mich 424, 159492 and 159493 (July 20, 2021), vacated and remanded 327 Mich App 375; 933 NW2d 506 (2019), to Circuit Courts. Supreme Court majority (Cavanagh, McCormack, Bernstein, and Clement) reviewed whether plaintiffs' claims fell within scope of arbitration agreements limited to matters that are "relative to" plaintiffs' employment. Whether plaintiffs' allegations of sexual assault, and claims stemming from those allegations, are relative to plaintiffs' employment is resolved by asking whether claims can be maintained without reference to contract or relationship at issue. *Doe v. Princess Cruise Lines, Ltd*, 657 F.3d 1204, 1218-1219 (11th Cir., 2011) ("If the cruise line had wanted a broader arbitration provision, it should have left the scope of it at 'any and all disputes, claims, or controversies whatsoever' instead of including the limitation that narrowed the scope to only those disputes, claims, or controversies 'relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company.' "). Because Circuit Courts did not have benefit of this framing, Supreme Court vacated COA and remanded cases to Circuit Courts for reconsideration of whether plaintiffs' claims subject to arbitration. Because plaintiffs also did not have benefit of this framing when filing their claims, plaintiffs may seek to amend their complaints before Circuit Courts make this determination.

Supreme Court dissent (Viviano and Zahra) said Court must interpret contractual language to determine whether parties meant to assign plaintiffs' claims to arbitration.

According to dissent, proper interpretation of contract language shows plaintiffs' claims against defendant law firm are arbitrable. Dissent would reverse COA decision to contrary. Claims against defendant Morse individually also arbitrable under contract if he can invoke arbitration clause. Because COA did not determine whether Morse has authority to enforce agreement, which he did not sign, dissent would remand on that issue.

Justice Welch did not participate because Court considered disposition before she assumed office.

https://www.courts.michigan.gov/497a6a/siteassets/case-documents/uploads/opinions/final/sct/159492_76_01.pdf

Previously, in now vacated ***Lichon v Morse***, 327 Mich App 375; 933 NW2d 506, 339972 (2019), COA split decision, COA held sexual harassment claim not covered by arbitration provision in employee handbook. Because provision limited arbitration only to claims related to plaintiffs' employment, and because sexual assault by employer or supervisor cannot be related to employment, arbitration provision was inapplicable to claims against Morse and law firm. "[C]entral to our conclusion … is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." O'Brien COA dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and claims that arguably fell within scope of arbitration agreement.

Hornberger, "Due Process Protocol Influence on Statutory Claims Employment Arbitration in Michigan," *The General Practitioner* (January/February 2017).

https://www.leehornberger.com/media/Protocol-GP--JanFeb2017.pdf

Hornberger, "Overview of a Pre-Dispute Employment Resolution Process," *ADR Newsletter* (February 2005).

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Feb05.pdf

Arbitration in UIM no fault case.

Nickola v MIC Gen Ins Co, 500 Mich 115; 894 NW2d 552 (2017), reversed portion of 312 Mich App 374; 878 NW2d 480 (2015), denying plaintiff penalty interest under Uniform Trade Practices Act, MCL 500.2001 *et seq*. COA discussed attorney fee and interest issues arising from uninsured motorist case that included an arbitration.

Waiver of right to arbitration.

Nexteer Auto Corp v Mando Am Corp, 500 Mich 955; 891 NW2d 474, 153413 (2017), lv den 314 Mich App 391; 886 NW2d 906 (2016). Party waived right to

arbitration when it stipulated arbitration provision did not apply. In **dissent, Justice Markman** agreed COA correctly held party claiming opposing party had expressly waived contractual right to arbitration does not need to show it will suffer prejudice if waiver is not enforced. Markman said COA erred by holding defendant expressly waived right to arbitration by signing case management order that contained checked box next to statement: "An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable." He would have reversed COA on express waiver and remanded for consideration of whether defendant's conduct gave rise to implied waiver, waiver by estoppel, or no waiver. **LESSON: Be careful when checking boxes.**

Does arbitrator decide attorney fee in lien case?

Ronnisch Constr Group, Inc v Lofts on the Nine, LLC, 499 Mich 544; 886 NW2d 113 (2016) (Justices Viviano, Markman, McCormack, and Bernstein). Plaintiff can seek attorney fees under MCL 570.1118(2) of Construction Lien Act where plaintiff received favorable award on breach of contract claim but not on construction lien claim. Arbitrator did not address attorney fee claim but reserved issue for Circuit Court. Circuit Court may award attorney fees to plaintiff because plaintiff was lien claimant who prevailed to enforce construction lien through foreclosure. Affirmed 306 Mich App 203 (2014).

Dissent (Justices Young, Zahra, and Larsen) said recovery of CLA attorney fees permitted only to lien claimants who prevail on construction lien. Because plaintiff did not meet definition of CLA lien claimant, and because it voluntarily extinguished its lien claim before Circuit Court could have so determined, plaintiff not entitled to fees.

Dispute with individuals within arbitration agreement.

Altobelli v Hartmann, 499 Mich 284; 884 NW2d 537 (2016). Plaintiff's tort claims against principals of law firm fell within scope of arbitration clause that required arbitration for any dispute between firm and former principal. Plaintiff, a former principal, challenged actions defendants performed as agents carrying out firm business. Supreme Court said this was dispute between firm and former principal that fell within arbitration clause and subject to arbitration. Supreme Court reversed those portions of 307 Mich App 612; 816 NW2d 913 (2014), which held matter not subject to arbitration.

This case is discussed at Gilbride & Cobane, "Extending Arbitration Agreements to Bind Non-Signatories," *Michigan Bar Journal* (Feb. 2019), pp. 20-22.

http://www.michbar.org/file/barjournal/article/documents/pdf4article3592.pdf?_gl=1*1fjnte5*_ga*MTUyMDE4NjA3OC4xNjA0NjE0ODY2*_ga_JVJ5HJZB9V*MTY4MzgxNTY0MC43NzAuMS4xNjgzODE2MjEwLjAuMC4w

Not all artwork invoice claims subject to arbitration.

Beck v Park West Galleries, Inc, 499 Mich 40; 878 NW2d 804 (2016), partially reversed COA 319463 (2015), considered whether arbitration clause in invoices for artwork purchases applied to disputes arising from prior purchases when invoices for prior purchases did not refer to arbitration. Court held arbitration clause contained in later invoices cannot be applied to disputes arising from prior sales with invoices that did not contain clause. Court reversed part of COA judgment that extended arbitration clause to parties' prior transactions that did not refer to arbitration. Court recognized policy favoring arbitration of disputes arising under CBAs but said this does not mean arbitration agreement between parties outside collective bargaining context applies to any dispute arising out of any aspect of their relationship.

Duty to defend in arbitration.

Hastings Mut Ins Co v Mosher Dolan Cataldo & Kelly, Inc, 497 Mich 919; 856 NW2d 550 (2014) reversed COA (296791). COA erred in holding insurer did not have duty to defend insured in arbitration case. Insurer had duty to defend, despite theories of liability asserted against insured not covered under policy, if there are theories that fall within policy.

Is arbitration award "verdict" for case evaluation purposes?

Acorn Investment Co v Mich Basic Prop Ins Ass'n, 495 Mich 338; 852 NW2d 22 (2014). Basic rejected case evaluation. Appraisal panel's award was less favorable to Basic than case evaluation. Supreme Court held requirement action proceed to verdict was satisfied. Under definition of verdict "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." Acorn may recover its actual costs because motion for entry of judgment caused case to "proceed to verdict" when Circuit Court ruled on motion. Supreme Court reversed COA and remanded case to Circuit Court.

COA vacates second award and confirms first award.

City of Holland v French, 495 Mich 942; 843 NW2d 485 (2014), denied leave from 309367 (June 18, 2013). Justice Markman dissented. First arbitrator held City lacked just cause to terminate defendant and must reinstate her with back pay. Circuit Court vacated and required second arbitration. Second arbitrator ruled in favor of City, and Circuit Court affirmed. In split decision, COA reversed Circuit Court's vacatur of first award and remanded for entry of order enforcing first award.

Arbitrator, not MERC, to decide past practice issue.

Macomb Co v AFSCME, 494 Mich 65; 833 NW2d 225 (2013) (Young, Markman, Kelly, and Zahra [majority]; McCormack and Cavanagh [dissent]; Viviano [took no part]). Employer did not commit ULP when it refused to bargain with union over

decision to change actuarial table used to calculate retirement benefits. ULP complaints concerned subject covered by CBA. CBA grievance process avenue to challenge employer's actions. Arbitrator, not MERC, best equipped to decide whether past practice matured into term or condition of employment.

Arbitrator can hear claims arising after referral to arbitration.

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, 493 Mich 933, 825 NW2d 580 (2013) reversed COA and reinstated Circuit Court denying defendants' motion to vacate award and confirming award. Dissent in 303619 (May 31, 2012), said stipulated order intended arbitration include claims beyond those pending because it allowed further discovery, gave arbitrator Circuit Court powers, and award would represent full and final resolution. Claims not pending at time order entered not outside scope of arbitrator's powers.

Shareholder arbitration agreement covers discrimination claims.

Hall v Stark Reagan, PC, 493 Mich 903; 823 NW2d 274 (2012) (Young, Markman, MB Kelly and Zahra [majority]; Hathaway, Cavanagh, and M Kelly [dissent]). Supreme Court reversed part of COA judgment, 294 Mich App 88; 818 NW2d 367 (2012), which held matter was not subject to arbitration. Supreme Court reinstated Circuit Court order ordering arbitration. Dispute concerned motives of shareholders in invoking separation provisions of Shareholders' Agreement. According to majority, this, including allegations of violations of CRA, MCL 37.2101 *et seq*, is a "dispute regarding interpretation or enforcement of . . . parties' rights or obligations" under Shareholders' Agreement, and was subject to arbitration pursuant to Agreement. Dissents said Shareholders Agreement provided only for arbitration of violations of Agreement, not for allegations of discrimination under CRA.

CBA just cause provision gives arbitrator authority.

36th Dist Ct v Mich Am Fed of State Co and Muni Employees, 493 Mich 879; 821 NW2d 786 (2012), in lieu of granting leave, reversed part of COA judgment that reversed award of reinstatement and back pay. Supreme Court said MCR 3.106 does not preclude such relief where CBA has just cause standard for termination. In 295 Mich App 502 (2012), COA ruled that because CBA did not abrogate Chief Judge's statutory or constitutional authority to appoint court officers, arbitrator exceeded jurisdiction by requiring Chief Judge to re-appoint grievants to their positions.

Parental pre-injury waivers and arbitration.

Woodman ex rel Woodman v Kera LLC, 486 Mich 228; 785 NW2d 1 (2010), five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, held parental pre-injury waiver unenforceable under common law because, absent special circumstances, parent does not have authority to contractually bind his or her child. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). In *McKinstry*, pregnant mother signed waiver requiring arbitration of any claim on behalf of her unborn

child. Mother contested validity of waiver after child was injured during delivery. Court considered Medical Malpractice Arbitration Act, MCL 600.5046(2) (repealed 1993 PA 78), which said minor bound by written agreement to arbitrate disputes upon execution of agreement on his behalf by parent or guardian. *McKinstry* held statute required arbitration agreement signed by mother bound her child. Justice Young said *McKinstry* said arbitration agreement would not have been binding under common law and *McKinstry's* interpretation of MCL 600.5046(2) was departure from common law that parent has no authority to release or compromise claims by or against child. He said common law can be modified or abrogated by statute. Child can be bound by parent's act when statute grants authority to parent. MCL 600.5046(2) changed common law to permit parent to bind child to arbitration agreement.

Supreme Court upholds labor award concerning take-home vehicle.

Kentwood v POLC, 483 Mich 1116; 766 NW2d 869 (2009), affirmed COA reversal of Circuit Court vacatur of labor arbitration award. Arbitrator held grievant was to be assigned take-home vehicle because of past practice of assigning vehicles and burden on employer to prove it had repudiated practice without objection by union. Arbitrator held past practice was binding working condition that could not be altered without mutual consent where CBA is silent on vehicle assignment. Arbitrator held manual provision was only valid to extent it was consistent with CBA, including established practices and that decision not to assign vehicle was inconsistent with past practice. Justice Markman dissented, with Justice Corrigan joining, indicating he would reinstate Circuit Court order vacating award because CBA does not refer to vehicles, and department policy accords Chief discretion in assigning vehicles.

***Ex parte* submission to employment arbitration panel inappropriate.**

Gates v USA Jet Airlines, Inc, 482 Mich 1005; 756 NW2d 83 (2008), vacated award and remanded case to Circuit Court because one of parties submitted to arbitration panel *ex parte* submission in violation of arbitration rules. Submission may have violated MRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and 3.5(b) (prohibiting *ex parte* communication regarding pending matter).

Preliminary injunction vacated - six to one decision.

DFFA v Detroit, 482 Mich 18; 753 NW2d 579 (2008). Issue was whether Circuit Court properly issued preliminary injunction to prevent implementation of City's layoff plan. Union contended plan violated *status quo* provision, MCL 423.243, of Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, by jeopardizing firefighters' safety. Circuit Court must conclude plan is so inextricably intertwined with safety that its implementation would alter *status quo* by altering this condition. Circuit Court found issues of fact whether layoffs would impact on safety which is mandatory subject of bargaining. COA, 271 Mich App 457 (2006), affirmed Circuit Court. Supreme Court held injunction erroneously entered. Whether layoff plan

jeopardized safety requires scrutiny of plan and finding that plan is intertwined with safety such that it would have significant impact on safety. Circuit Court erred when it issued preliminary injunction. Circuit Court, in effect, issued permanent injunction where merits of alleged *status quo* violation would never be resolved. Supreme Court held, when safety claim is alleged, employer's challenged action alters *status quo* during pendency of Act 312 arbitration only if action is so intertwined with safety that action would alter condition of employment.

Preliminary injunction vacated - four to three decision.

PFFU v Pontiac, 482 Mich 1; 753 NW2d 595 (2008). Circuit Court abused discretion in issuing preliminary injunction preventing City from implementing plan to lay off Union members. Union sought preliminary injunction against layoffs pending resolution of ULP charge, collective bargaining, or interest arbitration. Circuit Court granted preliminary injunction after ruling Union satisfied elements for injunctive relief. COA upheld preliminary injunction. 271497 (November 30, 2006). Supreme Court said Union failed to meet burden of establishing irreparable harm would result. Supreme Court reversed COA and vacated Circuit Court order granting preliminary injunction.

Failure to tape record DRAA hearing.

Kirby v Vance, 481 Mich 889; 749 NW2d 741 (2008), in lieu of granting leave, reversed COA (278731) and held arbitrator exceeded DRAA authority under when arbitrator failed to adequately tape record arbitration proceedings. Circuit Court erred when it failed to remedy arbitrator's error by conducting its own evidentiary hearing. Supreme Court remanded case for entry of order vacating award and ordering another arbitration before same arbitrator. **LESSON: Make sure audio recorder is working.**

Parties covered by arbitration.

Werdlow v Detroit Policemen & Firemen Ret Sys Bd of Trs, 477 Mich 893; 722 NW2d 428 (2006), in lieu of granting leave, vacated, in part, COA and remanded case for entry of order granting summary disposition. COA correctly held Circuit Court lacked jurisdiction to grant relief because unions were not parties to arbitration. Section 10, MCL 423.240, of Michigan Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, provides that awards are final and binding.

Continued existence of common-law arbitration.

Wold Architects & Eng'rs v Strat, 474 Mich 223; 713 NW2d 750 (2006). Common-law arbitration not preempted by former Michigan Arbitration Act, MCL 600.5001 *et seq*. Common-law arbitration agreements unilaterally revocable before award. Statutory arbitration has to comply with MAA, including written agreement providing award enforceable in Circuit Court. Conduct during arbitration of non-written

acquiescence in proceeding under arbitration rules that provided for court enforcement did not transform common-law arbitration into statutory arbitration.

Formal hearing format not required.

Miller v Miller, 474 Mich 27; 707 NW2d 341 (2005). DRAA, MCL 600.5070 *et seq*, does not require formal hearing concerning property issues similar to that which occurs in regular trial proceedings.

Due process requirements in employment arbitration.

Renny v Port Huron Hosp, 427 Mich 415; 398 NW2d 327 (1986). *Renny* held:

> where an employee has expressly consented to submit a complaint to a joint employer-employee grievance board established by the employer with the knowledge that the resulting decision is final and binding, the decision shall be final unless the court finds as a matter of law that the procedures used did not comport with elementary fairness. *Id*. at 418.

In *Renny* the employee was not permitted to have counsel present or see the complaint against her. She was not informed of the identity of witnesses testifying at the hearing. She was not present during the testimony or during opening remarks. There were no records or transcripts of the discharge hearing, and the tribunal made no finding. No witnesses could be called without the tribunal's consent. A witness's appearance was voluntary. An employee had no right to cross examine or rebut testimony or to make closing arguments. *Id*. at 423-424.

Renny held elements necessary to fair arbitration proceedings are:

1. Adequate notice to persons who are to be bound by the adjudication;

2. The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;

3. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction. situation, or status;

4. A rule specifying the point in the proceeding when a final decision is

rendered; and,

5. Other procedural elements as may be necessary to ensure a means to determine the matter in question. ... . *Id*. at 437.

COA Conflicts Panel reviews arbitration procedural due process issues.

Rembert v Ryan's Family Steak Houses, Inc, 235 Mich App 118; 596 NW2d 208, lv den 461 Mich 923 (1999), indicated:

> While our decision upholds the principle of freedom of contract and advances the public policy that strongly favors arbitration, it does so subject to two conditions generally accepted in the common law: that the agreement waives no substantive rights, and that the agreement affords fair procedures. *Id*. at 124.

Rembert noted that *Renny* "suggest[s] certain baseline fundamentals to ensure fairness in an arbitral process for discrimination claims." *Id*. at 161. *Rembert* held that to satisfy *Renny* and MCR 3.602, the arbitration procedures must provide:

1. Clear notice the employee is waiving the right to adjudicate claims in court and is instead opting for arbitration,

2. The right to representation by counsel,

3. A neutral arbitrator,

4. Reasonable discovery,

5. A fair arbitral hearing, and

6. Written awards containing findings of fact and conclusions of law. *Id*. at 163-165.

B. Michigan Court of Appeals Published Decisions

COA reverses Circuit Court order not to arbitrate with Board members.

Steward v Sch Dist of the City of Flint, ___ Mich ___, 361112 and 361120 (May 11, 2023). Plaintiff was hired by defendants to serve as Superintendent of schools for City of Flint. She worked under written employment agreement that had broad arbitration clause for resolution of disputes. Signatories to contract were Plaintiff and "Board of Education of the School District of the City of Flint." Plaintiff clashed with several members of Board, including defendants (Board members). Plaintiff complained Board members created hostile work environment. Dispute resulted in plaintiff's removal. After plaintiff filed suit against Board members, they moved for summary disposition based on contractual arbitration provision. Circuit Court granted relief to all of entity defendants,

but not Board members because they were not parties to employment agreement that contained arbitration provision. COA reversed denial of summary disposition because obligation to arbitrate disputes extended to Board members as well as School District. COA ruled Circuit Court erred in denying Board members ability to demand arbitration under employment agreement between Plaintiff and District. *Altobelli v Hartmann*, 499 Mich 284; 884 NW2d 537 (2016).

https://www.courts.michigan.gov/499df7/siteassets/case-documents/uploads/opinions/final/coa/20230511_c361112_33_361112.opn.pdf

Circuit Court should stay case instead of dismissal when orders arbitration.

Legacy Custom Builders, Inc v Rogers, ___ Mich App ___, 359213 (Feb 9, 2023). Plaintiff appealed Circuit Court order compelling arbitration. COA held Circuit Court correctly enforced agreement to arbitrate, but **should have stayed proceedings pending arbitration instead of dismissing case**. Burden on party seeking to avoid agreement, not party seeking to enforce agreement. MUAA, MCL 691.1681 *et seq*., and Michigan Court Rules required Circuit Court to stay lawsuit pending arbitration. MCL 691.1687; MCR 3.602(C).

https://www.courts.michigan.gov/490bc6/siteassets/case-documents/uploads/opinions/final/coa/20230209_c359213_45_359213.opn.pdf

COA reverses Circuit Court order asking question of arbitrator in prior case.

Mahir D Elder, MD, PC v Deborah Gordon, PLC, ___ Mich App ___, 359225 (Sep 22, 2022). Plaintiff sued former employer for wrongful termination and received large monetary award from arbitration proceeding. Award stated plaintiff should receive compensation as calculated by Chart B, but award then listed lower monetary amount in Chart A. Plaintiff's attorney apparently did not notice discrepancy and confirmed award. Prior case was then dismissed. When plaintiff sued his attorney for legal malpractice, Circuit Court decided to send question to arbitrator to determine whether arbitrator meant to award plaintiff monetary amount stated in award. Plaintiff appealed. COA reversed. "After you have reviewed the materials, please confirm whether you intended to award Dr. Elder $5,516,907 in back pay, front pay and exemplary damages, or some other amount." According to COA, MCL 691.1694(4) precludes "any statement, conduct, decision, or ruling occurring during the arbitration proceeding." This prohibits compelling arbitrators from giving factual evidence as a witness regarding statements, conduct, decisions, or rulings that it may have made during arbitration proceeding.

https://www.courts.michigan.gov/4a727a/siteassets/case-documents/uploads/opinions/final/coa/20220922_c359225_48_359225.opn.pdf

Pre-dispute arbitration agreement in legal malpractice case.

Tinsley v Yatooma, 333 Mich App 257, 349354 (Aug 13, 2020), lv den ___ Mich ___ (2021), involved pre-dispute arbitration provision in legal malpractice case. COA held under plain language of MRPC 1.8(h)(1) and EO R-23 arbitration provision enforceable because client consulted with independent counsel. COA stated, "**We suggest contemplation by the State Bar of Michigan and our Supreme Court of an addition to or amendment of MRPC 1.8 to specifically address arbitration clauses in attorney-client agreements**."

Rules of Professional Conduct Rule 1.19, effective Sep 1, 2022, says,

Rule 1.19. Lawyer-Client Representation Agreements: Arb Provisions

A lawyer shall not enter into agreement for legal services with client requiring that any dispute between lawyer & client be subject to arb unless client provides informed consent in writing to arb provision, which is based on being

(a) reasonably informed in writing regarding scope & advantages & disadvantages of arb provision, or

(b) independently represented in making agreement.

Confirmation of award partially reversed in construction lien case.

TSP Servs, Inc v Nat'l-Std, LLC, 329 Mich App 615 (Sep 10, 2019). Michigan law limits construction lien to amount of contract less payment already made. Although party suing for breach of contract might recover consequential damages beyond monetary value of contract, those consequential damages cannot be subject to construction lien. Arbitrator concluded otherwise. This clear legal error had substantial impact on award. COA reversed with respect to confirmation of that portion of award.

COA affirms order to arbitrate labor case.

Registered Nurses Union v Hurley Med Ctr, 328 Mich App 528 (April 18, 2019). Grievants terminated for allegedly striking in violation of CBA. Although defendant may present to arbitrator undisputed evidence plaintiffs engaged in strike, question of fact is for arbitrator to decide. Any doubt regarding whether question is arbitrable must be resolved in favor of arbitration. Circuit Court correct in ruling CBA required arbitration.

Denial of motion to vacate affirmed.

Radwan v Ameriprise Ins Co, 327 Mich App 159 (Dec 20, 2018), lv den ___ Mich ___ (2019). First-party no-fault case. COA held Michigan Uniform Arbitration Act, MCL 691.1681 *et seq*., not MCR, applied; and Circuit Court did not err when it denied motion to vacate arbitration award on basis of collateral estoppel.

COA reverses Circuit Court order that denied motion to require arbitration.

Lebenbom v UBS, 326 Mich App 200 (Oct 23, 2018). COA held parties' arbitration clause provided for FINRA arbitration encompassed plaintiff's claims alleging conversion against defendant.

Arbitration agreement does not have to be in warranty document.

Galea v FCA US LLC, 323 Mich App 360 (2018). Plaintiff alleged new vehicle was a lemon. She asserted warranty claims. Defendants said signed arbitration agreement. Plaintiff argued Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., prohibits binding arbitration of warranty disputes. This was inconsistent with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004). Plaintiff argued by failing to mention arbitration, warranty violated single document rule in 16 CFR 701.3, FTC regulation implementing MMWA. According to Plaintiff, this omission foreclosed arbitration. Majority (Gadola and O'Brien) interpreted *Abela* to mean arbitration provision need not be in warranty. Gleicher's dissent stated arbitration agreements outside warranty not enforceable.

DRAA award partially vacated.

Eppel v Eppel, 322 Mich App 562 (2018). COA held arbitrator deviated from plain language of Uniform Spousal Support Attachment by including profit from ASV shares. Deviation substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361; 808 NW2d 230 (2010), lv den ___ Mich ___ (2012). Deviation readily apparent on face of award.

Offer of judgment and subsequent award confirmation.

Simcor Constr, Inc v Trupp, 322 Mich App 508 (2018). MCR 2.405, offer of entry of judgment, applied to District Court's confirmation of arbitration award, and offer of judgment costs were merited. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338; 852 NW2d 22 (2014) (case evaluation sanctions).

Consolidated of arbitration cases under FAA.

Lauren Bienenstock & Assoc, Inc v Bienenstock, 314 Mich App 508; 887 NW2d 237 (2016). Arbitrator has authority under Federal Arbitration Act, 9 USC § 1 *et seq*, to determine whether arbitration cases should be consolidated when arbitration agreement is silent on issue. COA did not address Michigan Uniform Arbitration Act, MCL 691.1681 *et seq*, because issue was controlled by federal law.

COA partially confirms and partially vacates award in defamation case.

Hope-Jackson v Washington, 311 Mich App 602; 877 NW2d 736 (2015), affirmed confirmation of part of award in defamation case concerning tolling,

defamation, presumed damages, actual malice, and $360,000 in *per se* damages; and reversed confirmation of part of award concerning $140,000 exemplary damages. Since there had been no retraction request, arbitrator's granting of exemplary damages was error of law on face of award. MCL 600.2911(2).

Pre-arbitration hearing submission of exhibits.

Fette v Peters Constr Co, 310 Mich App 535; 871 NW2d 877 (2015). Michigan Arbitration Act, MCL 600.5001 *et seq*, controlled; not Uniform Arbitration Act, MCL 691.1681 *et seq*. Record did not support plaintiffs' contention arbitrator considered exhibits defendant electronically shared before hearing in making award determination. Even if award against great weight of evidence or not supported by substantial evidence, COA precluded from vacating award. Allowing parties to electronically submit evidence prior to hearing did not affect plaintiffs' ability to present evidence they desired.

Lay-offs go to court, not STC or CBA.

Baumgartner v Perry Pub Schs, 309 Mich App 507; 872 NW2d 837 (2015), lv den ___ Mich ___ (2015). Legislature exercised constitutional authority concerning teacher layoffs. Legislature made merit, not seniority, controlling factor in layoffs by removing layoffs as bargaining subjects and this removed unions and administrative agencies from dispute-resolution process. Legislature gave school boards power to make layoff decisions, and gave courts exclusive power to review such decisions.

Pre-award lawsuit concerning arbitrator selection.

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc, 304 Mich App 46; 850 NW2d 408 (2014), reflects viewpoint no part of arbitration more important than selecting arbitrator. Elkouri & Elkouri, *How Arbitration Works* (8th ed), p 4-39; and Abrams, *Inside Arbitration* (2013), p 37. AAA did not appoint panel member who had specialized qualifications required in agreement. Plaintiff sued to enforce requirements. Circuit Court ruled in favor of defendant and AAA. COA in split decision reversed. Issue was whether plaintiff could bring pre-award lawsuit concerning arbitrator selection. Majority said courts usually will not entertain pre-award objections to selection. But, when suit is brought to enforce essential provisions of agreement concerning selection, courts will enforce mandates. When such provision is central, Federal Arbitration Act (FAA), 9 USC 1, *et seq*, provides it should be enforced by courts prior to arbitration hearing. 9 USC 5. Party may petition court before award if (1) arbitration agreement specifies qualifications arbitrator must possess and (2) arbitration administrator fails to appoint arbitrator who meets these qualifications. Court may issue order, § 4 FAA, requiring arbitration proceedings conform to arbitration agreement. Majority awarded plaintiff Circuit Court and COA costs and attorney fees.

Judge Jansen dissent said party cannot obtain judicial review of qualifications of arbitrators pre-award. 9 USC 10.

This case is discussed at Esshaki, "Judicial Intervention in Arbitration Proceedings Pre-Award," *Michigan Bar Journal* (June 2023), p. 30.

http://www.michbar.org/file/barjournal/article/documents/pdf4article2627.pdf?_gl=1*3ciwoh*_ga*MTUyMDE4NjA3OC4xNjA0NjE0ODY2*_ga_JVJ5HJZB9V*MTY4MzgxNTY0MC43NzAuMS4xNjgzODE1NjU1LjAuMC4w

Offsetting decision-maker biases can arguably create neutral tribunal.

White v State Farm Fire and Cas Co, 293 Mich App 419; 809 NW2d 637 (2011), discussed whether MCL 500.2833(1)(m) appraiser who receives contingency fee for appraisal is sufficiently neutral. COA said courts have upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create effectively neutral tribunal by building in offsetting biases.

Michigan Constitution trumps CBA.

AFSCME v Wayne Co, 292 Mich App 68; 811 NW2d 4 (2011), held that under judicial branch's inherent constitutional authority Circuit Court's judges have exclusive authority to determine assignment of court clerk to serve in courtroom. Promulgation of Administrative Order was proper exercise of Circuit Court authority, and Circuit Court was not bound by CBA, arbitrator's ruling, on issue of courtroom assignments. COA ruled that PERA, MCL 423.201 et seq, aegis CBA and award that encroach on judicial branch's inherent constitutional powers cannot be enforced to extent of encroachment.

Arbitrator to determine timeliness issue.

AFSCME v Hamtramck Housing Comm, 290 Mich App 672; 804 NW2d 120 (2010). Determination of timeliness and defense of laches must be made by arbitrator in assessing whether claim is arbitrable.

Complaint must be filed to obtain award confirmation.

Jaguar Trading Limited Partnership v Presler, 289 Mich App 319; 808 NW2d 495 (2010). Complaint must be filed to obtain confirmation of award. Having failed to invoke Circuit Court jurisdiction under Michigan Arbitration Act, MCL 600.5001 *et seq*, by filing complaint, plaintiff not entitled to confirmation. Issue was whether plaintiff, as party seeking confirmation under MCR 3.602(I) and MAA was required to file complaint to invoke Circuit Court jurisdiction. COA held, because no action pending, plaintiff required to file complaint. Since plaintiff timely filed award with court clerk, matter remanded so plaintiff could file complaint in Circuit Court.

How many correction motions allowed?

Vyletel-Rivard v Rivard, 286 Mich App 13; 777 NW2d 722 (2009); lv gtd 486 Mich 938; 782 NW2d 502 (2010), stip dism __Mich __(2010). Defendant challenged

Circuit Court denying motion to vacate DRAA award. COA affirmed because motion to vacate not timely filed. On March 28, 2008, defendant, MCL 600.509(2), filed motion to vacate "awards" of November 13 and December 7, 2007. Party has 21 days to file motion to vacate in DRAA case. MCR 3.602 (J)(2).

Six-year limitation period for action to vacate labor arbitration award.

Ann Arbor v AFSCME, 284 Mich App 126; 771 NW2d 843 (2009). There is no statute or court rule providing limitations period for actions seeking to vacate public labor arbitration awards. Actions to vacate awards are more like actions to enforce awards than to DFR actions. *Rowry v Univ of Mich*, 441 Mich 1 (1992), held plaintiff has six years to seek enforcement of labor award and this period may be diminished if award grants equitable relief and delay in enforcement would prejudice defendant in way that evokes laches to bar plaintiff's claim.

COA approves probate arbitration.

In split decision, ***In re Nestorovski Estate***, 283 Mich App 177; 769 NW2d 720 (2009), held probate proceedings not inherently unarbitrable.

Record requirements in statutory rights employment arbitration.

Saveski v Tiseo Architects, Inc, 261 Mich App 553; 682 NW2d 542 (242810) (2004), said the *Rembert* record requirements are more stringent because a court reviewing a civil rights claim must have a means of analyzing whether the arbitrator properly preserved the employee's statutory rights.

https://www.courts.michigan.gov/497196/siteassets/case-documents/uploads/opinions/final/coa/20040413_c242610_69_65o.242610.opn.coa.pdf

Michigan Court of Appeals Unpublished Decisions

COA reverses Circuit vacatur of award.

Certainty Construction, LLC, 361276 (May 25, 2023). In this contract dispute, the Circuit Court vacated award of attorney fees and determination that construction lien was valid. Because there was nothing on face of award that evinced error of law, COA held Circuit Court erred by vacating attorney fees award.

COA affirms Circuit Court ordering arbitration.

UAW v 55th Circuit Court, 361366 (May 11, 2023). Union argued Employer did not properly or timely request arbitration under CBA, and matter was therefore withdrawn and no longer arbitrable. Employer argued CBA provides threshold issue of

whether Union's request for arbitration was timely submitted for Circuit Court, rather than arbitrator, to decide. Circuit Court and COA held that threshold issues of whether Union timely invoked arbitration under CBA to be decided by arbitrator.

https://www.courts.michigan.gov/499ded/siteassets/case-documents/uploads/opinions/final/coa/20230511_c361366_52_361366.opn.pdf

COA affirms Circuit Court confirmation of remanded clarified award.

Soulliere v Berger, 359671 (April 27, 2023), **app lv pdg**. COA affirmed Circuit Court denying defendants' motion to vacate award and instead confirming arbitrator's award as clarified by arbitrator pursuant to COA's previous remand.

https://www.courts.michigan.gov/498fb5/siteassets/case-documents/uploads/opinions/final/coa/20230427_c359671_30_359671.opn.pdf

COA reverses Circuit Court order not to arbitrate.

Payne-Charley v Team Wellness Ctr, Inc, 361380 (April 13, 2023). Employer appealed Circuit Court holding employment agreement did not require parties to arbitrate dispute. According to Employer, parties required to resolve dispute in arbitration under plain terms of employment agreement. COA agreed and reversed.

https://www.courts.michigan.gov/497bf4/siteassets/case-documents/uploads/opinions/final/coa/20230413_c361380_57_361380.opn.pdf

COA affirms Circuit Court on arbitration waiver issue.

Renu Right, Inc v Shango, 359976 (March 23, 2023). Shango argued he did not have knowledge of his right to arbitration and Circuit Court erred in concluding he waived his right to arbitration. COA disagreed and affirmed Circuit Court not ordering arbitration. Shango claimed he did not read agreement and could not have waived his right to arbitration because he allegedly had no knowledge of arbitration clause. Plaintiff's motion to Circuit Court filed more than 140 days after arbitrator awarded economic damages. She filed motion without a pending claim before Circuit Court. Circuit Court without authority to rule on plaintiff's motion since there was no pending claim. Even if there had been pending claim, plaintiff was past 90-day time limit to file motion to modify or vacate award.

https://www.courts.michigan.gov/4957bb/siteassets/case-documents/uploads/opinions/final/coa/20230323_c359976_41_359976.opn.pdf

COA affirms confirmation of employment arbitration award.

Waller v Blue Cross Blue Shield of Michigan, 360392 (March 23, 2023). Michigan Uniform Arbitration Act, not the court rule, applies because MCL 691.1683(1) states MUAA governs all agreements to arbitrate made after July 1, 2013, and MCR 3.602(A) confines court rules to all other forms of arbitration that are not governed by UAA. MUAA does not contemplate arbitration must be closed before party may move to vacate or modify award from that arbitration. MCL 691.1703(1) provides Circuit Court may vacate "an award" from arbitration proceeding without requiring award be final and definite award. Plaintiff's contention party may only challenge final and definite award to Circuit Court is without support. Award regarding attorney fees and costs did not modify economic and noneconomic damages that were already awarded.

https://www.courts.michigan.gov/4957a4/siteassets/case-documents/uploads/opinions/final/coa/20230323_c360392_43_360392.opn.pdf

COA affirms order to arbitrate.

Barada v American Premium Lubricants, LLC, 359625 (March 23, 2023). Plaintiffs moved to strike defendants' "affirmative defense" of arbitration, arguing defendants waived their right to arbitration because they were participating in the litigation. Defendants filed witness lists, participated in depositions, and stipulated to add parties as codefendants after having asserted their "affirmative defense" to arbitration. Circuit Court held arbitration clause plainly stated arbitration was exclusive remedy to disputes under contract and that there was no carve out for injunctive relief. Plaintiffs appealed. COA affirmed.

https://www.courts.michigan.gov/4957ce/siteassets/case-documents/uploads/opinions/final/coa/20230323_c359625_41_359625.opn.pdf

COA partially affirms Circuit Court concerning ordering arbitration.

Vascular Management Services of Novi, LLC v EMG Partners, LLC, 360368 (March 9, 2023). Plaintiffs appealed order compelling plaintiffs and defendants to participate in binding arbitration. COA affirmed but remand to Circuit Court for further proceedings regarding arbitrability.

https://www.courts.michigan.gov/493ba1/siteassets/case-documents/uploads/opinions/final/coa/20230309_c360368_57_360368.opn.pdf

COA affirms Circuit Court confirming award.

Yaffa v Williams, 360732 (March 2, 2023). Williamses purchased home from Yaffa. In seller's disclosure statement, Yaffa represented septic tank and drain field in working order. Later inspection report noted home had public sewer system, but it also indicated bathroom drainage system was not adequately functioning. Inspector suggested further investigation needed. No further inspection occurred. Parties agreed to addendum to purchase agreement, which required Yaffa to provide additional $2,000 toward closing costs. After Williamses took possession of home, they discovered septic system not operational. Matter submitted to arbitration. Arbitrator found Yaffa fraudulently misrepresented septic system was in working order when he sold home. Arbitrator awarded Williamses exemplary damages and costs. Circuit Court confirmed award. COA affirmed confirmation. COA stated:

> Although this Court reviews de novo a trial court's decision to enforce an arbitration award, our review is "extremely limited." *Fette v Peters Const Co*, 310 Mich App 535, 541; 871 NW2d 877 (2015). "A reviewing court may not review the arbitrator's findings of fact, and any error of law must be discernible on the face of the award itself." *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009) … . Thus, "only a legal error that is evident without scrutiny of intermediate mental indicia will suffice to overturn an arbitration award." *Id*. (quotation marks and citation omitted). This Court will not review "the arbitrator's mental path leading to the award." Id. (quotation marks, citation, and alteration omitted). "[A]ny error of law must be so substantial that, but for the error, the award would have been substantially different." *Id*. (quotation marks and citation omitted). Because "courts may not substitute their judgment for that of the arbitrators," any claims of legal error "must be carefully evaluated in order to assure that [they are] not used as a ruse to induce the court to review the merits of the arbitrator's decision." *Id*. at 675 … .

https://www.courts.michigan.gov/492cca/siteassets/case-documents/uploads/opinions/final/coa/20230302_c360732_34_360732.opn.pdf

COA affirms Circuit Court confirming award.

Clancy v Entertainment Managers, LLC, 357990 (February 2, 2023), **app lv pdg**. Advance for wedding reception case. AAA administered arbitration under expedited proceedings pursuant to its Commercial Arbitration Rules. According to COA, defendant did not explain how it was prejudiced by use of expedited procedures such that award would have been "substantially otherwise" had arbitration been conducted differently. Contrary to defendant's assertion, arbitrator did not disallow official recording of arbitration hearing or prevent defendant from arranging stenographic recording of proceeding. Concerning attorney fees, plaintiffs' contention that arbitration provision allowed award of reasonable attorney fees for "[a]ll claims and disputes arising under or

relating to [the] Agreement" within plain language of provision. COA affirmed Circuit Court confirmation of award.

https://www.courts.michigan.gov/48fd58/siteassets/case-documents/uploads/opinions/final/coa/20230202_c357990_51_357990.opn.pdf

COA affirms Circuit Court confirming arbitration award.

Domestic Uniform Rental v Bronson's, 359297 (Jan 19, 2023). Case arose from rental agreement between parties for delivery of supplies. Defendants appealed order confirming award. COA affirmed. According to Circuit Court and COA, arbitrator did not make errors of law by enforcing contract terms. COA agreed with appellant that award reflected an error of law concerning attorney fee award, but **Circuit Court did not err by confirming award because appellants cannot demonstrate that substantially different award would have been rendered but for the error**. As long as arbitrator is even arguably construing or applying contract and acting within scope of authority, court may not overturn award even if convinced arbitrator committed serious error. *Ann Arbor v Am Fed of State, Co & Muni Employees*, 284 Mich App 126; 771 NW2d 843 (2009).

https://www.courts.michigan.gov/48f0b4/siteassets/case-documents/uploads/opinions/final/coa/20230119_c359297_39_359297.opn.pdf

COA holds court case stayed rather than dismissed when case sent to arbitration.

SP v Lakelands Golf and Country Club, 359710 (Jan 12, 2023). COA affirmed Circuit Court determination hostile work environment allegations of complaint subject to arbitration. COA affirmed Circuit Court decision to stay proceedings pending arbitration. To extent Circuit Court may have dismissed, rather than stayed, any of plaintiff's claims that were sent to arbitration, it erred by doing so, and those claims are reinstated and stayed. COA held individual defendant entitled to enforce arbitration agreement despite not being signatory to agreement and question of arbitrability of plaintiff's claims question for court. See ***Legacy Custom Builders, Inc v Rogers***, ___ Mich App ___, 359213 (Feb 9, 2023).

https://www.courts.michigan.gov/48e2d2/siteassets/case-documents/uploads/opinions/final/coa/20230112_c359710_39_359710.opn.pdf

COA affirms Circuit Court denying motion to compel arbitration

Schmidt v Bowden, 360454 (Jan 5, 2023). After parties closed on sale of property, plaintiff commenced arbitration proceedings regarding sales commission with Board of

Realtors. Defendant argued plaintiff was not entitled to commission and commission dispute not subject to arbitration. Circuit Court denied motion to compel arbitration. COA affirmed. Plaintiffs conceded parties did not contract to arbitrate commission issue. Plaintiffs presented no written agreement regarding commission, with or without an arbitration clause. There was no arbitration clause for the court to review. Plaintiffs argued that even though parties did not agree to arbitrate, they are compelled to arbitrate because both plaintiff and defendant, as real estate professionals, voluntarily belonged to real estate organizations that required arbitration of disputes. Plaintiffs assert that defendant belonged to North Oakland County Board of Realtors and plaintiff belonged to Ann Arbor Board of Realtors, both of which have rules containing mandatory arbitration provisions. Plaintiffs asserted that Michigan 2021 Code of Ethics and Arbitration Manual applicable to real estate professionals, as well as MLS where defendant listed her home, also compel arbitration. Plaintiffs theorized that because parties are members of real estate associations, rules of those associations impute to parties agreement to arbitrate a disputed commission. Plaintiffs did not support this theory with Michigan authority.

https://www.courts.michigan.gov/48dc08/siteassets/case-documents/uploads/opinions/final/coa/20230105_c360454_31_360454.opn.pdf

COA rules court, not arbitrator, to decide validity of arbitration agreement

Domestic Uniform Rental v Custom Ecology of Ohio, Inc, 358591 (Dec 22, 2022). Reversing Circuit Court, COA held court, not arbitrator, must decide validity of arbitration agreement. Party cannot be required to arbitrate issue which it has not agreed to submit to arbitration. Existence of arbitration agreement and enforceability of its terms are questions for court, not arbitrator. MCL 691.1686(2).

https://www.courts.michigan.gov/4b02a7/siteassets/case-documents/uploads/opinions/final/coa/20221222_c358591_32_358591.opn.pdf

Legal malpractice case.

Lam v Do, 354174 (Nov 22, 2022). Following binding domestic relations arbitration, Do was displeased with results. He cited errors in arbitrator's calculation of Lam's income for child support purposes and sought credit in property division for supporting Lam in her postdoctoral work. Arbitrator rejected these points and a final divorce decree entered. COA affirmed in part, but remanded for recalculation of child support based on Lam's previous three years of income pursuant to 2017 Michigan Child Support Formula (MCSF) 2.02(B).

https://www.courts.michigan.gov/4b0373/siteassets/case-documents/uploads/opinions/final/coa/20221122_c354174_67_354174.opn.pdf

COA affirms confirmation of award.

Clark v Suburban Mobility Auth for Reg Trans, 359204 (Nov 10, 2022). In matters involving arbitration, it is purview of arbitrator to decide substantive issues between parties and court's role is limited. Whether dispute is subject to arbitration is for court to determine. MCL 691.1686(2). Award for PIP benefits not basis for reversal of Circuit Court's order.

https://www.courts.michigan.gov/4b01cc/siteassets/case-documents/uploads/opinions/final/coa/20221110_c359204_34_359204.opn.pdf

COA affirms dismissal of action to vacate award.

Wolf Creek Production, Inc v Gruber, 358559 (Sep 29, 2022), lv den ___ Mich ___ (2023). COA affirmed Circuit Court *sua sponte* dismissal of complaint to vacate award because plaintiff failed to file timely motion to vacate. MCR 3.602.

https://www.courts.michigan.gov/4a817d/siteassets/case-documents/uploads/opinions/final/coa/20220929_c358559_30_358559.opn.pdf

Distinction between money judgment and judgment lien.

Asmar Constr Co v AFR Enters, Inc, 357147 (Sep 15, 2022), lv den ___ Mich ___ (2023). This dispute turns upon distinction between money judgment and judgment lien. In 2011, Circuit Court entered judgment confirming arbitration award. Award, which was incorporated in judgment, reduced to $550,000 plaintiffs' construction lien on parcel of property. Award authorized plaintiffs to obtain from defendant personal guaranty in amount of lien only as it relates to sale of property. Almost decade later, Circuit Court granted plaintiffs' ex parte motion to renew judgment. Defendants objected by moving to set aside judgment lien renewal. Circuit Court granted motion, characterizing its 2011 "judgment" as a lien. COA concluded 2011 "judgment" was much more a lien than a "noncontractual money obligation." COA affirmed. Issue was whether Circuit Court's "Judgment Confirming Arbitrator's Award" should be treated as judgment renewable within ten years pursuant to MCL 600.5809(3) or as judgment lien that must be renewed within five years under MCL 600.2801 and MCL 600.2809.

https://www.courts.michigan.gov/4a747d/siteassets/case-documents/uploads/opinions/final/coa/20220915_c357147_55_357147.opn.pdf

COA affirms Circuit Court confirming award.

Wikol v Select Commercial Assets, LLC, 355393 (Sep 15, 2022). Plaintiff appealed Circuit Court order denying his motion to vacate or modify arbitrator's decision to dismiss plaintiff's arbitration claims against defendants on basis of collateral estoppel and res judicata. COA affirmed.

https://www.courts.michigan.gov/4a681a/siteassets/case-documents/uploads/opinions/final/coa/20220915_c355393_56_355393.opn.pdf

COA affirms Circuit Court confirming award.

D & R Maintenance Mgt, Inc v 955 S Monroe LLC, 357867, 357870 (July 28, 2022), lv den ___ Mich ___ (2022). Porter litigants moved Circuit Court to vacate award asserting (1) arbitrator improperly shifted burden of proof, (2) arbitrator refused to consider material evidence, (3) arbitration hearing was conducted in manner that substantially prejudiced Porters, and (4) award was based upon miscalculations. Circuit Court denied motion, determining motion did not identify error of law by arbitrator and arbitrator did not improperly shift burden of proof. Circuit Court not persuaded by allegedly contradictory statements made by arbitrator during hearing because "those aren't rulings. Those aren't findings." COA affirmed.

https://www.courts.michigan.gov/4a2350/siteassets/case-documents/uploads/opinions/final/coa/20220728_c357867_57_357867.opn.pdf

COA reverses Circuit Court ordering arbitration.

Allen v Smith, 358047 (July 28, 2022). COA held question of fact remained as to whether defendant had right to invoke arbitration and Circuit Court erred when it ordered arbitration. Because there was factual dispute bearing on validity of arbitration agreement, COA remanded to Circuit Court to hold evidentiary hearing. Although validity of arbitration clause was not in question, questions arose as to whether defendant is proper party to Agreement, and whether defendant can enforce arbitration clause. MCL 691.1686. Circuit Court did not find defendant was party to Operating Agreement, which was essential to determining issue of arbitrability.

https://www.courts.michigan.gov/4a2350/siteassets/case-documents/uploads/opinions/final/coa/20220728_c358047_41_358047.opn.pdf

COA in reconsideration split decision reverses consent JOD enforcing award.

Hans v Hans, 355468, 356936 (July 7, 2022), **app lv pdg**. Circuit Court entered JOD, consistent with arbitrator's award. JOD approved by plaintiff and defendant. Defendant filed motion for clarification of JOD concerning distribution of proceeds from sale of real property, primarily because of competing attorney liens. Circuit Court issued order explaining how sale proceeds to be distributed. Plaintiff appealed. COA reversed in **reconsideration flip split decision**. According to COA, aside from unsecured marital debt, consent JOD called for sales proceeds from both properties to be divided equally between plaintiff and defendant. Fact that defendant was ordered to pay $50,000 toward plaintiff's attorney fees did not entitle him to more than 50% of net proceeds. Circuit Court erred by ordering "75/25" debt split as to payment of parties' atty fees. On remand, Circuit Court shall enter orders consistent with COA opinion.

Judge Murray dissent said property settlement provisions of JOD, unlike alimony or child support provisions, are final and generally cannot be modified. Parties, court, and arbitrator knew need for flexibility was paramount. Law allows court to fill in gaps to JODs. Circuit Court exercised that flexibility. Result not inequitable under circumstances.

https://www.courts.michigan.gov/495814/siteassets/case-documents/uploads/opinions/final/coa/20220331_c355468_78_355468.opn.pdf

https://www.courts.michigan.gov/496659/siteassets/case-documents/uploads/opinions/final/coa/20220331_c355468_79_355468d.opn.pdf\

https://www.courts.michigan.gov/4a4003/siteassets/case-documents/uploads/opinions/final/coa/20220707_c355468_87_355468r.opn.pdf

https://www.courts.michigan.gov/4a4003/siteassets/case-documents/uploads/opinions/final/coa/20220707_c355468_88_355468rd.opn.pdf

COA reverses Circuit Court ordering arbitration.

Chambers v Catholic Charities of Shiawassee and Genesee Counties, 358103 (June 23, 2022). Plaintiffs brought employment case. Signed employee handbook had comprehensive arbitration agreement which said "**provisions of this arbitration procedure does [sic] not create any contract of employment, express or otherwise, and does [sic] not, in any way, alter the `at-will' employment relationship**." Circuit Court held case should go to arbitration. In light of exclusionary language, COA reversed. *Heurtebise v Reliable Business Computers*, 452 Mich 405; 550 NW2d 243 (1996). Circuit Court erred by concluding parties entered into binding arbitration agreements.

https://www.courts.michigan.gov/49f1a4/siteassets/case-documents/uploads/opinions/final/coa/20220623_c358103_29_358103.opn.pdf

COA affirms Circuit Court ruling defendant did not waive right to compel arbitration.

Cangemi v Prestige Cadillac, Inc, 356069 (June 9, 2022). COA affirmed Circuit Court ruling defendant did not waive its right to compel arbitration. Circuit Court ruled plaintiff's waiver argument failed because he did not address whether he was prejudiced. On appeal, plaintiff argued he is no longer required to show prejudice to establish defendant waived right to arbitration. *Morgan v Sundance, Inc*, 596 US ___; 142 S Ct 1708 (2022). COA held, assuming plaintiff is correct he did not need to show prejudice in light of *Morgan*, Circuit Court did not err by ruling plaintiff failed to meet heavy burden of proving defendant waived its right to enforce arbitration clause for other reasons. Party raising issue of waiver has heavy burden of proof, and must demonstrate opposing party had knowledge of right to compel arbitration and performed acts inconsistent with right.

https://www.courts.michigan.gov/49ca68/siteassets/case-documents/uploads/opinions/final/coa/20220609_c356069_57_356069.opn.pdf

COA affirms Circuit Court denial of motion to correct judgment.

TSP Services, Inc v National-Standard LLC, 356729 (May 12, 2022), lv den ___ Mich ___ (2023). TSP argued Circuit Court should have granted its motion for summary disposition and corrected the revised judgment on the award to reflect that judgment was against DW-National Standard, not National-Standard. TSP also argued Circuit Court erred when it granted DW-National Standard's motion and dismissed TSP from the case. COA disagreed with TSP and affirmed Circuit Court. See ***TSP Servs, Inc v Nat'l-Std, LLC***, 329 Mich App 615, 342530 (September 10, 2019). To extent that there might have been ambiguity about identity of parties to arbitration agreement, arbitrator resolved ambiguity on first day by formally identifying parties to arbitration.

https://www.courts.michigan.gov/49ac9b/siteassets/case-documents/uploads/opinions/final/coa/20220512_c356729_33_356729.opn.pdf

COA affirms Circuit Court denial of motion to vacate DRAA award.

Barnett [pro se on appeal] v Barnett, 354668 (April 28, 2022), lv den ___ Mich ___ (2022). COA affirmed Circuit Court denial of motion to vacate DRAA award. Before JOD entered, plaintiff moved to vacate award, MCL 600.5081(2), alleging (1) arbitrator refused to hear material evidence, (2) evaluation report was not made available to parties until shortly before arbitration hearing and arbitrator denied plaintiff's request to adjourn

hearing, (3) arbitrator denied plaintiff's request to adjourn hearing to consider 2019 accounting records for defendant's two businesses, and (4) arbitrator refused to consider that parties' 19-year-old child was disabled and cared for by plaintiff, and likely would need an adult's care for the remainder of his life. COA said "It was up to plaintiff's counsel, not the arbitrator, to explain any parts of the agreement or the arbitration process that plaintiff could not read or did not understand."

https://www.courts.michigan.gov/499417/siteassets/case-documents/uploads/opinions/final/coa/20220428_c354668_99_354668.opn.pdf

COA affirms vacatur of labor arbitration award.

Mich AFSCME Council 25 v Wayne Co, 356320 and 356322 (April 21, 2022), **app lv pdg**. In split decision, COA affirmed Circuit Court vacatur of labor arbitration award. On verge of discharge, employee took cash-in retirement. Employee applied for retirement while awaiting outcome of disciplinary action initiated by employer arising from work accident. His retirement application required him to agree to "separation waiver." The "waiver" stated he was terminating his employment and not seeking reemployment. Defendant terminated his employment following day. Employee allowed his retirement application to proceed, but he also filed grievance pursuant to CBA with employer, seeking reinstatement of employment. In meantime, County Employees' Retirement System approved employee's retirement. Employee thereafter transferred his defined contribution retirement account funds to an IRA. Arbitrator reinstated employee in spite of background IRS issues. Circuit Court and COA vacated reinstatement award in light of IRS issues. **Vigorous oral argument before COA**.

Judge Jansen dissent stated that because arbitrator did not exceed its authority in issuing award, Circuit Court should have confirmed award. Applicability of defenses to arbitration, including waiver, is for arbitrator to decide. Only two issues before arbitrator where (1) whether employee was terminated for just cause, and (2) if not, whether remedy is limited to back pay rather than reinstatement. Separation waiver was raised before arbitrator as defense, but not as total bar to reinstatement. This issue was not raised by employer until after award entered. Arbitrator properly treated it as affirmative defense. Employer's argument that award was illegal or violated public policy because of possible tax code violations irrelevant.

Top link is two judge decision. Middle link is dissent. Bottom link is oral argument.

https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_57_356320.opn.pdf

https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_58_356320d.opn.pdf

https://www.courts.michigan.gov/496f07/siteassets/case-documents/uploads/coa/public/audiofiles/audio_356320_04122022_102538.mp3

On Sep 28, 2022, Supreme Court ordered that oral argument on application be scheduled. Parties will address: (1) whether standard in *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982), applies to labor arbitration cases, see *Bay City Sch Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 440 n 20 (1986), and *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150 (1986); and (2) whether Circuit Court erred in vacating arbitrator's awards.

https://www.courts.michigan.gov/courts/supreme-court/cases-awaiting-argument/164435-6-mi-afscme-council-25-v-wayne-county/

As background information, ***Mich Family Res, Inc v SEIU***, 475 F3d 746 (6th Cir 2007)(en banc), discusses standard for reviewing labor arbitration awards. In *Mich*, Union appealed District Court vacating award. Sixth Circuit reversed because arbitrator acting within scope of authority, company had not accused arbitrator with fraud or dishonesty, arbitrator was arguably construing CBA, and company had shown no more than arbitrator made error in interpreting CBA. *Mich* said following should be looked at in deciding whether to vacate labor arbitration award. Did arbitrator act outside authority by resolving dispute not committed to arbitration? Did arbitrator commit fraud, have conflict of interest or act dishonestly in issuing award? In resolving legal or factual disputes, was arbitrator arguably construing or applying CBA? As long as arbitrator does not offend any of these requirements, request for judicial intervention should be denied even though arbitrator made serious, improvident, or silly errors. Arbitrator exceeds authority only when CBA does not commit dispute to arbitration.

Mich AFSCME Council 25 is discussed at "*Michigan AFSCME Council 25 v Wayne County* - A Saga of *Steelworkers* Trilogy, *Michigan Family*, and *Gavin*," *Oakland County Legal News* (January 31, 2023).

https://www.legalnews.com/oakland/1519761

COA affirms Circuit Court denial of motion to vacate DRAA award.

Pascoe v Pascoe, 356477 (April 14, 2022). COA affirmed Circuit Court denial of motion to vacate DRAA award. COA indicated review of awards extremely limited, including with respect to domestic relations awards. Review of award by court one of narrowest standards of judicial review in American jurisprudence. Award may be vacated in domestic relations case when arbitrator exceeded powers. MCL 600.5081(2)(c) and MCR 3.602(J)(2)(c). Party seeking to prove domestic relations arbitrator exceeded authority must show arbitrator (1) acted beyond material terms of arbitration agreement or (2) acted contrary to controlling law. Reviewing court may not review arbitrator's findings of fact, and any error of law must be discernible on face of award. Court not

permitted to review arbitrator's factual findings or arbitrator's decision on merits. COA stated arbitrator's "evidentiary findings and credibility assessments by the arbitrator were simply not subject to challenge in court." **Powerful outline of law concerning deference to arbitration awards.**

https://www.courts.michigan.gov/4974b1/siteassets/case-documents/uploads/opinions/final/coa/20220414_c356477_51_356477.opn.pdf

COA affirms Circuit Court ordering arbitration.

Tariq v Tenet Healthcare Corp, 356904 (March 24, 2022). Plaintiff appealed Circuit Court granting summary disposition in favor of defendants. Plaintiff alleged defendants engaged in retaliation and racial and nationality discrimination. Defendants moved for summary disposition, asserting plaintiff's claims subject to binding arbitration agreement. Circuit Court agreed. COA affirmed. Where arbitration provision is clearly presented as distinct and is executed separately, arbitration provision may be binding even if rest of handbook is not binding. COA required to resolve all doubts in favor of arbitration and to avoid bifurcating parties' claims between court and arbitrator.

https://www.courts.michigan.gov/495bee/siteassets/case-documents/uploads/opinions/final/coa/20220324_c356904_33_356904.opn.pdf

COA affirms confirmation of award.

TBI Solutions, Inc v Gall, 356747 (Feb 24, 2022), lv den ___ Mich ___ (2022). COA affirmed confirmation of employment arbitration award granting damages and attorney fees. Under MUAA, existence of arbitration agreement and enforceability of its terms are judicial questions for court to determine rather than for arbitrator. MCL 691.1686. If court determines dispute is arbitrable, merits of dispute are for arbitrator.

https://www.courts.michigan.gov/493d0a/siteassets/case-documents/uploads/opinions/final/coa/20220224_c356747_30_356747.opn.pdf

COA affirms non-granting of attorney fees.

Atlas Indus Contractors v Ross, 356179 (Feb 17, 2022). COA agreed with Circuit Court that arbitrator was not empowered to award defendants attorney fees and costs after final award because defendants requested award of attorney fees and costs under arbitration provision in contract, and arbitrator had already addressed merits of plaintiff's breach of contract claims. AAA Rules for Commercial Litigation, Rule 47(d)(ii), precluded award of attorney fees and costs after entry of final award. Defendants did not request award of attorney fees and costs prior to entry of final award.

Defendants' motion to reopen case and for attorney fees and costs amounted to request to modify final award. **How to handle attorney fee request.**

https://www.courts.michigan.gov/493977/siteassets/case-documents/uploads/opinions/final/coa/20220217_c356179_36_356179.opn.pdf

COA reverses confirmation of award against non-signatory.

Domestic Uniform Rental v AZ Auto Ctr, 355780 (Feb 17, 2022). In this commercial contract dispute, COA affirmed Circuit Court confirmation of award as to arbitration agreement signatories over objections that arbitrator used expedited procedures without agreement of defendants and Circuit Court inappropriately referred to arbitrator question whether defendants were properly served notice of arbitration. COA reversed concerning confirmation, without explanation, of award against two defendants who were not parties to agreement.

https://www.courts.michigan.gov/49398e/siteassets/case-documents/uploads/opinions/final/coa/20220217_c355780_26_355780.opn.pdf

COA affirms confirmation of DRAA award.

Zalewski v Homant, 354218, 354561 (Feb 1, 2022). COA affirmed Circuit Court denial of defendant's motion to vacate DRAA award. Defendant's arguments regarding arbitrator purportedly exceeding authority were a ruse to induce the court to review the merits of the arbitrator`s decision. See *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 497; 475 NW2d 704 (1991). **Zalewski** is discussed at O'Neil, The Scope of Arbitration, *Michigan Family Law Journal* (March 2022), p. 3.

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/29647f32-d7bf-4b3b-97a7-a9359ef92056/UploadedImages/pdf/newsletter/March2022.pdf

https://www.courts.michigan.gov/493a2c/siteassets/case-documents/uploads/opinions/final/coa/20220201_c354218_34_354218.opn.pdf

COA affirms Circuit Court confirmation of award.

Jenkins v Suburban Mobility Auth for Reg'l Trans, 355452 (Jan 13, 2022). Plaintiff appealed Circuit Court confirmation of award. Plaintiff challenged order granting defendant's motion to strike and exclude claims at arbitration. Plaintiff argued Circuit Court erred when it decided whether she could arbitrate claims that she assigned to her medical providers because those claims were governed by parties' arbitration

agreement. Plaintiff contended Circuit Court's ruling was against contractual terms of parties' agreement. COA affirmed Circuit Court.

https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113_c355452_44_355452.opn.pdf

https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113_c355452_45_355452c.opn.pdf

COA affirms Circuit Court confirmation of DRAA award.

Hoffman v Hoffman, 356681 (Dec 16, 2021). If agreement leaves any doubts about arbitrability, doubts should be resolved in favor of arbitration. As general rule, arbitration clause written in broad, comprehensive language includes all claims and disputes, award is presumed to be within scope of arbitrator's authority absent express language to contrary. COA affirmed Circuit Court confirmation of DRAA award.

https://www.courts.michigan.gov/49391f/siteassets/case-documents/uploads/opinions/final/coa/20211216_c356681_44_356681.opn.pdf

COA affirms Circuit Court confirmation of DRAA award.

Borke v Kinney, 350809, 354237 (Nov 23, 2021), lv den __Mich ___ (2022). COA held arbitrator had authority to determine defendant's income for purposes of calculating payments under terms of settlement agreement. Circuit Court did not err in confirming award. COA said defendant's arguments regarding arbitrator purportedly exceeding authority were ruse to induce court to review merits of arbitrator's decision.

https://www.courts.michigan.gov/493b24/siteassets/case-documents/uploads/opinions/final/coa/20211123_c350809_76_350809.opn.pdf

COA affirms Circuit Court that scheduling grievance not subject to arbitration.

Berrien County v Police Officers Labor Council, 355352 (Sep 30, 2021). COA agreed with Circuit Court that because Union did not cite specific CBA provision that would impose limit on Employer's CBA right to schedule use of compensatory time, Employer's management right to schedule hours and shifts were not subject to arbitration. CBA unambiguously reserved certain matters as management rights, including right to schedule hours and shifts of work. Grievances arising out of plaintiffs' actions regarding management rights not grievable and not subject to arbitration.

COA reverses Circuit Court order denying arbitration.

Saidizand v GoJet Airlines, LLC, 355063 (Sep 23, 2021), **app lv pdg**. Arbitration agreement unambiguously provided only arbitrator had authority to resolve any dispute relating to interpretation or applicability of agreement. Because parties clearly and unmistakably agreed only arbitrator had authority to determine whether claims were subject to arbitration under agreement, COA held Circuit Court erred by interpreting agreement and deciding whether ELCRA claims were subject to arbitration.

COA holds that court, not arbitrator, decides arbitrability issue.

Bay County Road Comm v John E Green Company, 347439, 347712 (Sep 16, 2021). Parties to agreement to arbitrate may not vary effect of MCL 691.1686 or MCL 691.1687, which grant court authority to decide existence of arbitration agreement or whether issue is arbitrable, summarily decide issue, and order parties to arbitrate. MCL 691.1684(2)(a) and (3). AAA Construction Industry Arbitration Rules do not deprive court of subject matter jurisdiction because they are Rules, not statutes as required under MCL 600.605. MUAA did not deprive court of subject matter jurisdiction and allow delegation of determination of jurisdiction to arbitrator.

COA affirms Circuit Court not to order arbitration.

Milford Hills Properties, Inc v Charter Twp of Milford, 353249, 353489 (Sep 2, 2021). COA affirmed Circuit Court determination defendant did not show arbitration agreement should be enforced, but reversed denial of summary disposition in connection with plaintiffs' claims. Defendant alternatively argued, if any claims are not dismissed on their merits, matter should be referred to arbitration to resolve dispute over amount of excess capacity. COA agreed with Circuit Court that defendant had failed to show arbitration was in order.

COA said conclusion plaintiffs' claims were without merit as matter of law rendered issue of extent to which wastewater treatment plant has excess capacity moot in connection with those claims. Question of arbitration remains premature until and unless plaintiffs on remand persuade Circuit Court to allow them to amend their complaint to attempt to revive their tort claims by adding individual parties and new theories in avoidance of governmental immunity. COA affirmed Circuit Court that defendant has not shown arbitration agreement should be enforced at this time.

COA reverses not ordering arbitration.

Barkai v VHS of Michigan, Inc, 354587, 355607 (Aug 12, 2021). Defendants argued Circuit Court erred by holding there was no binding arbitration agreement between parties. Defendants argued that encompassed plaintiffs' WPA claims and non-

statutory claims of wrongful discharge, intentional or reckless infliction of emotional distress, and conspiracy to intentionally or recklessly inflict emotion distress. COA agreed with defendants and remanded the case for entry of order compelling arbitration.

COA affirms confirmation of DRAA award.

Dixon v Dixon, 355445 (Aug 12, 2021). Plaintiff appeals Circuit Court denying plaintiff's motion to vacate award which granted parties equal interest in their former marital home and granting defendant's motion to confirm award. COA affirmed.

COA affirms order to arbitrate.

Webb v Fidelity Brokerage Services, 354691 (July 29, 2021). COA affirmed Circuit Court that brokerage contract contained enforceable agreement to arbitrate.

COA affirms confirmation of clarified award.

Advanced Integration Technology, Inc v Rekab Industries Excluded Assets, LLC, 354302 (July 15, 2021). Arbitrator granted motion for summary disposition. In response to motion to vacate award, Circuit Court remanded award to arbitrator for clarification. Arbitrator issued clarified award. Circuit Court confirmed clarified award. COA confirmed Circuit Court's confirmation of clarified award. Plaintiffs argued Circuit Court should not have remanded case to arbitrator for clarification, but rather, Circuit Court should have vacated award. COA held MCL 691.1700(4) allows Circuit Court to remand to arbitrator "[t]o clarify the award." Circuit Court was not required to vacate award on basis that it was unclear or appeared arbitrator may have erred.

COA affirms confirmation of award.

Sean D Gardella & Assoc v Sieber, 354556 (June 17, 2021). Darcy did not sign contract. Darcy, along with Jonathan, owned property on which plaintiff did improvements pursuant to contract. Agreement identified both defendants as contracting parties. Written agreement could be considered an offer. Although Darcy did not sign contract, this was not dispositive. Darcy could be said to have accepted plaintiff's offer and assented to terms of contract by accepting plaintiff's performance of contract; specifically, improvements to her home, which plaintiff completed in accordance with agreement. Arbitrator said Darcy "was familiar with the terms and conditions of the work to be performed, the cost of the work[,] and . . . participated in decisions regarding the work." It was not improper for arbitrator to find Darcy jointly and severally liable for damages resulting from defendants' breach of contract and award attorney fees, as authorized by contract. COA affirmed confirmation of award.

COA affirms confirmation of award.

Centennial Home Group, LLC v Smith, 353854 (April 15, 2021). COA affirmed confirmation of award concerning retaining wall construction.

COA reverses not ordering arbitration.

Wieland Corp v New Genetics, LLC, 353484 (April 15, 2021), lv den ___ Mich ___ (2022). This case concerned whether defendants can compel arbitration of Wieland's claims and claims of subcontractors related to construction project. Wieland is a construction company and New Genetics cultivates medical cannabis. Circuit Court erred by not ordering arbitration of contractor claim. Sub-contractor claims were not subject to arbitration. Circuit Court was not required to keep all claims in one forum.

COA affirms Probate Court asking arbitrator for clarification.

Dina Mascarin Living Trust v Adkinson, 352816 (April 15, 2021). COA held Probate Court did not err when it referred matter back to arbitrator for correction or clarification. MCL 691.1700(4)(c).

COA affirms confirmation of no-fault award.

Lewis v IDS Property Casualty Ins Co, 351108 (March 25, 2021), lv den ___ Mich ___ (2021). Arbitrator issued award for $50,000. Defendant issued pay-off check for $40,000. $40,000 or $50,000? Med-arb. Defendant did not file motion to amend or correct arbitration award. COA affirmed confirmation of award.

COA affirms confirmation of award.

Prospect Funding Holdings v Reifman Law Firm, PLLC, 352808 (March 11, 2021), lv den ___ Mich ___ (2021). Arbitrator declined to consider defendant's arguments because defendant failed to pay associated filing fees. COA affirmed award confirmation.

COA affirms refusal to reopen attack on old award.

Asmar Constr Co v AFR Enterprises, Inc, 350488 (March 11, 2021), lv den ___ Mich ___ (2023). In this business dispute, which involved two arbitration hearings which took place ten years ago regarding project from more than twenty years ago, and allegations that arbitrator was bribed, plaintiffs appealed Circuit Court denial of motion

for relief from judgment. MCR 2.612(C)(1)(f). Judgment entered in February 2011 as result of arbitration between plaintiffs and defendants which confirmed second award. Circuit Court held plaintiffs' motion for relief from judgment was untimely. COA affirmed.

COA remands case to labor arbitrator.

AFSCME Council 25 Local 1690 v Wayne Co Airport Auth, 352500 (March 11, 2021). Arbitrator followed one section of CBA in granting grievance but ignored arguably applicable CBA Art 34.07. Circuit Court confirmed award, recognizing limited scope of review of labor awards. COA reversed, vacated award and remanded case to same arbitrator. Because arbitrator never considered Art 34.07, award was not final or complete, nor was award rendered on merits, and remand to same arbitrator appropriate.

COA affirms Circuit Court in complicated benefits case.

Mich Spine & Brain Surgeons v Citizens Ins Co of the Midwest, 350498 (March 4, 2021). Ford and Citizens agreed to dismiss with prejudice litigation between them regarding PIP benefits, including action filed by Ford, and submit case to arbitration. Parties agreed award would represent resolution of claims for PIP benefits and for monies owing to Ford. Agreement provided, with exception of Provider Plaintiffs that have either intervened, settled privately or filed independent causes of action at time of agreement, arbitration include all medical billings known to either party. When Ford assigned to MSBS his right to payment by Citizens for his surgery, he had already agreed to submit all claims for PIP benefits that stemmed from accident to an arbitrator and had stipulated to dismissal of his lawsuit against Citizens with prejudice. At time Ford assigned his right to payment of PIP benefits to MSBS, he had no right to assert legal action against Citizens for these claims, He could not assign to MSBS more rights than he possessed. Circuit Court did not err by holding MSBS did not have standing to assert claim against Citizens for payment of PIP benefits for medical care rendered to Ford.

COA affirms confirmation of DRAA award.

Davidson v Davidson, 348788, 348808 (Jan 28, 2021), lv den ___ Mich ___ (2021). Plaintiff argued arbitration void for lack of authority. Arbitrator derives authority from arbitration agreement. Arbitration agreement, entered into while there was active case, was not affected by dismissal of divorce action. Plaintiff failed to show arbitration was void or without authority. Plaintiff did not show from face of award how arbitrator exceeded authority or committed error of law. COA affirmed confirmation of award.

COA affirms that arbitration agreement forecloses court case.

Gray v Yatooma, 351360 (Dec 17, 2020). Plaintiff had compensation agreement and non-compete with broad arbitration agreement. COA affirmed Circuit Court order that arbitration agreement prevented a court suit.

COA affirms denial of vacatur of award.

Rahaman v Ameriprise Ins Co, 349463 (Nov 24, 2020). Appellant argued award should be vacated because attorney, not party, signed agreement to arbitrate. COA held attorney can enter into binding arbitration agreement on behalf of client. MCR 2.507(G).

COA affirms denial of vacatur in disclosure case.

Wilson v Louis D. Builders, 351560 (Nov 19, 2020). Plaintiffs moved to vacate award because of arbitrator's alleged bias toward party and party's attorney. Plaintiffs also alleged arbitrator and opposing counsel held municipal positions together, worked on township matters, and interacted socially. Plaintiffs asserted these interactions were substantial and material relationships. Circuit Court denied motion to vacate. COA affirmed. MCL 691.1962.

COA affirms confirmation of award.

Kada v Nouri, 351402 (Nov 19, 2020). Plaintiffs appealed Circuit Court confirmation of award, and Circuit Court denial of attorney fees and costs. COA held Circuit Court did not abuse its discretion in confirming award and denying attorney fees.

COA affirms confirmation of award.

Soulliere v Berger, 349428 (Oct 29, 2020). COA affirmed confirmation of an award because defendants' disagreement with award implicates arbitrator's resolution of evidence and defendants did not demonstrate error of law apparent from face of award.

Waiver of arbitration.

Wells Fargo Bank, NA, v Walsh, 350960 (Oct 29, 2020). COA affirmed Circuit Court order finding defendant waived his right to compel arbitration. Defending action without seeking to invoke arbitration, constituted waiver of right to arbitration.

Settling case with help of arbitrator.

Estate of O'Connor v O'Connor, 349750 (Oct 15, 2020). In this dispute over enforcement of settlement agreement, defendant appealed Circuit Court order granting plaintiff's motion for entry of judgment. Defendant argued parties agreed to arbitration and arbitrator lacked authority to broker a settlement agreement. COA held defendant contributed to alleged error by seeking settlement, participating in settlement negotiations, and signing settlement agreement. COA affirmed Circuit Court.

COA affirms Circuit Court ordering arbitration in insurance case.

Fisk Ins Agency v Meemic Ins, 350832 (Sep 10, 2020). COA held Circuit Court properly concluded, in accordance with terms of Agreement, matter must be returned to arbitrator and arbitrator must address 90-day limitation in Agreement.

COA reverses vacatur of DRAA award.

Moore v Glynn, 349505 (Aug 27, 2020), lv den ___ Mich ___ (2021). COA held Circuit Court erred by determining arbitrator exceeded scope of authority by looking beyond four corners of parties' settlement agreement. Circuit Court erroneously determined agreement was not ambiguous. Circuit Court only had power to determine whether arbitrator acted within scope of authority and did not have power to interpret parties' contract. Because arbitrator did not exceed scope of authority, Circuit Court review should have ended and court should have confirmed award.

COA affirms Circuit Court order denying arbitration in condominium case.

Copperfield Villas Ass'n v Tuer, 348518 (May 21, 2020). MCL 559.154(8) and (9) require condominium bylaws to include provision for arbitration at "election and written consent of the parties." Plural noun "parties" demonstrates all parties to dispute must elect and consent to arbitration in lieu of litigation. Word "consent" supports this interpretation. It takes two to consent to participate in arbitration. Circuit Court correctly determined Tuers not permitted to unilaterally demand arbitration.

COA affirms Circuit Court order confirming award.

Altobelli v Hartmann, 348953 and 348954 (May 21, 2020), lv den ___ Mich ___ (2020). Plaintiff appealed Circuit Court confirmation of award. Award held plaintiff not entitled to relief because he voluntarily withdrew from membership with defendant firm and had not sufficiently proved proximate cause or amount of damages. Because Circuit Court properly determined award rested in part on issues of proximate cause and damages, which were beyond scope of judicial review, COA affirmed. See *Altobelli v Hartmann*, 499 Mich 284; 884 NW2d 537 (2016).

COA affirms Circuit Court order denying arbitration.

Andrus v Dunn, 345824, 346897, and 348305 (April 9, 2020), lv den ___ Mich ___ (2021). Award, adopted in JOD, required arbitration of disputes that arose regarding St. Martin property. August 2015 order said Andrus waived claims she had relating to St. Martin, including pursuant to prior awards and JOD, and Circuit Court had jurisdiction to enforce terms and conditions of settlement agreement regarding St. Martin property issue. Because JOD and August 2015 order covered same subject matter but contain inconsistent provisions regarding forum for resolving disputes on St. Martin property, August 2015 order reflects later agreement and supersedes JOD on that issue. Circuit Court properly denied Andrus's request to compel arbitration.

COA affirms confirmation of DRAA award.

Shannon v Ralston, 350094, 350110 (March 12, 2020), lv den ___ Mich ___ (2020). COA affirmed confirmation of DRAA award that granted motion to change primary physical custody of minor child in this domestic relations action. Because plaintiff's refusal to provide required financial information and proposed FOF and COL led to delay, plaintiff barred from claiming she was entitled to relief on basis of this delay.

COA affirms granting of motion to compel arbitration.

Century Plastics, LLC v Frimo, Inc, 347535 (Jan 30, 2020). COA affirmed Circuit Court holding that parties validly incorporated General Terms and its arbitration agreement by reference. General Terms applied to parties' agreement even though defendant not specifically listed entity.

COA affirms confirmation of DRAA award.

Daoud v Daoud, 347176 (Dec 19, 2019). COA affirmed Circuit Court confirmation of DRAA award. **Past domestic violence and PPO.** Where arbitrator provided parties equal opportunity to present evidence and testimony on all marital issues, recognized and applied Michigan law, and explained uneven distribution of property, there was no basis for concluding arbitrator exceeded authority.

COA reverses Circuit Court denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (Dec 19, 2019). COA reversed Circuit Court denying defendants' motion for arbitration because arbitration terms in construction agreements sufficiently related to plaintiffs' claims to require arbitration, and defendants had not waived their right to arbitration. Any doubts about arbitrability should be resolved in favor of arbitration. Purpose of arbitration is to preserve time and resources of courts in interests of judicial economy.

Refusal to adjourn arbitration hearing approved.

Domestic Uniform Rental v Riversbend Rehab, 344669 (Nov 19, 2019). After overruling R's motion to adjourn arbitration hearing, arbitrator entered award against R. COA affirmed CC's confirmation of award. MCL 691.1703(1)(c). **Mentioning arbitrator's name to COA during oral argument.**

Incorporation of AAA rules.

MBK Constructors, Inc v Lipcaman, 344079 (Oct 29, 2019), lv den ___ Mich ___ (2020). Incorporation of AAA's rules in arbitration agreement clear and unmistakable evidence of parties' intent to have arbitrator decide arbitrability.

COA affirms Circuit Court confirmation of award.

2727 Russell St, LLC v Dearing, 344175 (Sep 26, 2019), lv den ___ Mich ___ (2020). COA affirmed confirmation of award. Arbitrator's factual findings are not reviewable. **COA referenced "facilitation" and "statutory arbitration."** Med-arb.

COA affirms Circuit Court denial of sanctions.

Clark v Garratt & Bachand, PC, 344676 (Aug 20, 2019). COA affirmed Circuit Court denying G's sanctions motion. Language of award foreclosed G's ability to request sanctions because sanctions issue was either not raised during arbitration or, having been raised, resulted in arbitrator declining to award sanctions. Language of judgment confirming award also foreclosed G's ability to subsequently request sanctions.

Circuit Court order to arbitrate confirmed.

Roseman v Weiger, 344677 (June 27, 2019), lv den ___ Mich ___ (2019). To extent plaintiff argues arbitration agreement is unenforceable on ground that purchase agreement was invalid, these are matters for arbitrator. MCL 691.1686(3). Circuit Court did not err by concluding claims against sellers to be resolved in arbitration.

DRAA award confirmation confirmed.

Zelasko v Zelasko, 342854 (June 13, 2019), lv den ___ Mich ___ (2020), concerned whether husband's winning of $80 million jackpot was part of marital estate. Arbitrator ruled jackpot was marital property. Circuit Court confirmed award. COA affirmed confirmation. COA stated "we may not review the arbitrator's findings of fact and are extremely limited in reviewing alleged errors of law." Delay, death, and alleged bias of arbitrator issues. *Zelasko v Zelasko*, 324514 (2015), lv den ___ Mich ___ (2016).

DRAA custody dispute award confirmed.

Shannon v Ralston, 339944 (May 23, 2019), lv den ___ Mich ___ (2019). Agreement to arbitrate "all issues in the pending matter." COA affirmed confirmation of DRAA award that decided change in domicile. Arbitrator acted as mediator and arbitrator. At time of ex parte communication, arbitrator was acting as mediator, and prohibition against ex parte communications did not apply. Late raising of alleged disparaging remarks by neutral. Arbitrator's alleged financial interest in arbitration process. Plaintiff ordered to pay fees associated with GAL. Issue of arbitrator's alleged financial bias was one of plaintiff's own making by stopping payment in violation of parties' agreement to split cost of arbitration and in violation of arbitrator's instructions.

DRAA award confirmed.

Hyman v Hyman, 346222 (April 18, 2019). COA held Circuit Court modification of DRAA award to include Monday overnights was error because Circuit Court lacked authority to review arbitrator's factual findings and alter parenting-time schedule without finding award adverse to children's best interests.

COA affirms order to arbitrate labor case.

Sr Accountants, Analysts and Appraisers Ass'n v City of Detroit Water and Sewerage Dep't, 343498 (April 18, 2019). Issue of whether union complied with CBA procedural requirements to arbitrate is procedural issue for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). JOD arbitration clause named A as arbitrator and did not provide for alternate, substitute, or successor arbitrators. A became disqualified due to conflict of interest. MCL 600.5075. Because no evidence parties agreed upon new arbitrator to be appointed, Circuit Court permitted to void arbitration agreement and proceed as if arbitration had not been ordered.

COA reverses confirmation of employment arbitration award.

Checkpoint Consulting, LLC v Hamm, 342441 (Feb 26, 2019). COA held there was no valid arbitration agreement because independent contractor agreement voided all prior agreements, including arbitration clause within employment agreement.

COA affirms confirmation of employment arbitration award.

Wolf Creek Productions, Inc v Gruber, 342146 (Jan 24, 2019). COA affirmed confirmation of employment arbitration award. COA stated nothing on face of award

demonstrated arbitrators precluded from deciding issue of whether just cause existed to terminate employment. Courts precluded from engaging in contract interpretation, which is question for arbitrator.

COA affirms confirmation of exemplary damages award.

Grewal v Grewal, 341079 (Jan 22, 2019). COA affirmed judgment confirming arbitrator's award of $4,969,463.94 exemplary damages and correcting arbitrator's award by striking portion that ordered plaintiffs to provide accounting of assets in India.

COA affirms confirmation of award.

Hunter v DTE Services, LLC, 339138 (Jan 3, 2019). In employment discrimination case, COA affirmed confirmation of award. Arbitrator did not exceed authority by failing to provide citations to case law.

COA affirms confirmation of award.

Walton & Adams, LLC v Service Station Installation Bldg & Car Wash Equip, Inc, 340758 (Dec 18, 2018), lv den ___ Mich ___ (2019). COA affirmed confirmation of award. Arbitrator not required to make FOF or COL. Once court recognized arbitrator utilized controlling law, it cannot review legal soundness of arbitrator's application of law. Courts may not engage in fact-intensive review of how arbitrator calculated values, and whether evidence relied on was most reliable or credible evidence presented. Even if award against great weight of evidence or not supported by substantial evidence, court precluded from vacating award.

Case evaluation sanctions after arbitration.

Len & Jerry's Modular Components 1, LLC v Scott, 341037 (Dec 13, 2018). In light of referral to arbitration order, Circuit Court empowered to award case evaluation sanctions.

Scope of submission to arbitrator.

Pietila v Pietila, 339939 (Dec 13, 2018). COA affirms Circuit Court confirmation of award. Circuit Court may not disturb arbitrator's discretionary finding of fact that neither party prevailed in full and its decision not to award attorney fees.

COA affirms Probate Court confirmation of award.

Gordon v Gordon-Beatty, 339296 (Nov 8, 2018), lv den ___ Mich ___ (2019). COA affirmed Probate Court's confirmation of award. Because parties agreed to arbitrate

their disputes and because, arbitrator acted within scope of his authority the challenges to administration of the trusts lacked merit.

DRAA award confirmed.

Thomas-Perry v Perry, 340662 (Oct 16, 2018). Parties given opportunity to present evidence on all issues during arbitration. Because reviewing court is limited to examining face of arbitration ruling, there is no basis for concluding arbitrator exceeded authority in issuing award.

Length of FOF in award.

Schultz v DTE, 337964 (Sep 30, 2018). COA affirmed confirmation of nine page employment arbitration award. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118 (1999). FOF and COL.

COA affirms Circuit Court confirmation of award.

Mumith v Mumith, 337845 (June 14, 2018). COA affirmed Circuit Court's confirmation of award. Two to one arbitration panel award. COA stated:

> … judicial review of an arbitration award … is extremely limited." *Fette v Peters Const Co*, 310 Mich App 535, 541; 871 NW2d 877 (2015). "… '[a] court's review of an arbitration award "is one of the narrowest standards of judicial review in all of American jurisprudence." ' " *Washington*, 283 Mich App at 671 n 4, quoting *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999).

Demand for labor arbitration concerning prohibited subject of bargaining.

Ionia Co Intermediate Ed Assn v Ionia Co Intermediate Sch Dist, 334573 (Feb 22, 2018), lv den ___ Mich ___ (2018). COA affirmed Michigan Employment Relations Commission (MERC) order granting summary disposition, where Association engaged in ULP by demanding to arbitrate grievance concerning prohibited subject of bargaining under Public Employment Relations Act, MCL 423.201 *et seq.* MERC ordered Association to withdraw demand for arbitration and to cease and desist from demanding to arbitrate grievances concerning prohibited subjects of bargaining. See ***Mich Ed Ass'n v Vassar Pub Schs***, 337899 (May 22, 2018).

COA affirms Circuit Court confirmation of award.

Galasso, PC v. Gruda, 335659 (Feb 8, 2018). COA affirmed confirmation of award because there was no clear error of law on face of award. Uniform Arbitration Act, MCL 691.1681 *et seq.* MCL 691.1703(1)(d).

If parties agree, arbitrator can decide arbitrability.

Elluru v. Great Lakes Plastic, Reconstructive & Hand Surgery, PC, 333661 and 334050 (Feb 6, 2018). Parties may agree to delegate to arbitrator question of arbitrability, provided arbitration agreement clearly so provides. MCL 691.1684(1).

COA considers waiver of arbitration agreement.

Miller v Duchene, 334731 (Dec 21, 2017). COA reversed Circuit Court rejecting plaintiffs' contentions that defendants waived defense predicated on arbitration agreement and arbitration agreement did not encompass some defendants. With respect to initial defendants, issue was whether their waiver can be forgiven on basis that plaintiffs subsequently filed amended complaint. COA concluded waiver survived amended complaint and amended complaint did not revive initial defendants' ability to raise arbitration agreement as defense. Amended complaint did not alter scope of plaintiffs' allegations or nature of case. Same conclusion cannot be made with respect to subsequent defendants. They could not be bound by waiver made by other parties. Defense of agreement to arbitrate raised in timely fashion by subsequent defendants, where they raised it in motion for summary disposition filed before their first responsive pleading.

Amended award confirmed.

Ciotti v Harris, 332792 (Dec12, 2017). COA affirmed Circuit Court confirmation of reasoned award rendered after motion to arbitrator concerning nonreasoned award.

COA reverses vacatur of award.

Cook v Hermann, 335989 (Nov 21, 2017). COA held Circuit Court erred by vacating award. Circuit Court substituted its judgment for that of arbitrator.

Claims subject to arbitration.

Admin Sys Research Corp Int'l v Davita Healthcare Partners, Inc, 334902 (Nov 16, 2017). Circuit Court properly held defendants' claims subject to arbitration and not preempted by ERISA.

"May" does not mean mandatory.

Skalnek v Skalnek, 333085 (Oct 26, 2017), lv den ___ Mich ___ (2018). In this employment case, COA agreed with Circuit Court, that parties' agreement did not provide for mandatory arbitration because of use of word "may."

Arbitration, frozen embryos, and sua sponte analysis.

Karungi v Ejali, 337152 (Sep 26, 2017), lv den ___ Mich ___ (2018). COA split decision. Never married parties disputed what should be done with frozen embryos. Circuit Court ruled for technical reasons it did not have jurisdiction over embryo issue. COA said both parties and Circuit Court ignored fact that parties entered into contract that governed parties' interest in embryos and there was mandatory arbitration provision in previously non-cited contract. In light of this per curiam (O'Brien) and concurrence (Murray) remanded to Circuit Court to determine whether it has subject-matter jurisdiction. Dissent (Jansen) would not have altered entire procedural posture, sua sponte, to remand matter and allow parties to re-litigate theories they failed to raise.

Arbitration involving non-signatories to arbitration agreement.

Scodeller v Compo, 332269 (June 27, 2017), affirmed Circuit Court decision to compel arbitration, even against defendants who were not parties to arbitration agreement. Arbitration agreement broad enough to encompass those claims and, for policy reasons, it was expeditious to resolve those disputes in single proceeding. Plaintiffs, who were parties to arbitration agreement, estopped from avoiding arbitration against defendants who did not sign agreement where claims based on substantially interdependent and concerted conduct by all defendants. If parties cannot agree on arbitrator, Circuit Court shall appoint arbitrator.

COA approves DRAA award.

Holloway v Kelley, 331792 (June 27, 2017). COA agreed with Circuit Court that arbitrator did not exceed its authority, arbitrator followed law and did as asked when it resolved division of each party's interest in retirement plan.

No issue for arbitrator to resolve, therefore no arbitration.

Amante v Amante, 331542 (June 20, 2017). Plaintiff argued that under plain language of JOD, dispute regarding provision barring spousal support should be decided by arbitrator. Under JOD, "any disputes regarding the judgment language" should be submitted to arbitrator. Dispute concerned whether judgment should include provision barring spousal support. JOD and settlement agreement silent as to spousal support. This was not dispute concerning meaning of language within JOD. Circuit Court did not abuse discretion in denying plaintiff's request that dispute be arbitrated.

Party did not waive arbitration.

Universal Academy v Berkshire Dev, Inc, 330707 (June 20, 2017). Party did not waive right to arbitration by filing cross-complaint. "Except as otherwise provided in subsections (2) and (3), a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of this act to the extent permitted by law." MCL 691.1684(1).

Supplemental labor arbitration award.

Dep't of Trans v MSEA, 331951 (June 13, 2017). COA affirmed Circuit Court confirmation of supplemental labor arbitration award. Arbitrator ordered reinstatement, make whole remedy, and retained jurisdiction. Arbitrator then had to decide post-award issue concerning some 401(k) issues. COA held this was appropriate.

Losing party uses panel dissent to attack award.

Estate of James P Thomas, Jr v City of Flint, 331173 (April 20, 2017). COA affirmed Circuit Court denying motion to vacate award of arbitration panel. Arbitration panel, by 2-1 vote, ruled in favor of defendant. Plaintiff's first argument was Circuit Court erred in denying plaintiff's motion to set aside award based upon lack of impartiality by neutral arbitrator or by allowing limited discovery on issue of lack of impartiality. COA stated mere fact that one arbitrator disagrees with another does not establish, nor even "fairly raise," the possibility that either lacks impartiality.

Labor arbitration award confirmed.

Village of Oxford v Lovely, 331002 (April 13, 2017). COA affirmed Circuit Court granting defendant's motion to confirm award. Arbitration was conducted pursuant CBA between plaintiff employer and union and resulted in decision that in part reinstated employee's employment with plaintiff.

Case ordered to arbitration.

Rozanski v Findling, 330962 and 332085 (March 14, 2017). Plaintiffs appealed Circuit Court granting defendant's motion to compel arbitration and Circuit Court confirmation of award. Plaintiffs argued Circuit Court erred in granting summary disposition in favor of defendant where attorney fee agreement that contained arbitration provision was invalid. COA disagreed. MCL 691.1703.

Lawsuit not barred by agreement to arbitrate between other entities.

Pepperco-USA, Inc v Fleis & Vandenbrink Engineering, Inc, 331709 (Feb 21, 2017). Summary disposition is proper when claim is barred because of agreement to arbitrate. MCR 2.116©(7). Whether claim is subject to arbitration is reviewed de novo. Pepperco, not being party to arbitration clause, is not subject to arbitration with respect to its claims, even though related corporate entity, MP, would be subject to clause. Circuit Court erred in ruling that Pepperco's lawsuit was barred by agreement to arbitrate.

Two arbitrations.

AFSCME Local 1128 v City of Taylor, 328669 (Jan 19, 2017). Parties arbitrated grievance 20. Arbitrator held grievance, which implicated 45, not timely. Despite finding grievance untimely, arbitrator stated "if the merits of such claims were to be decided, the decision would be that ostensibly perpetual 100-employee guarantee was terminable at will and [the city] effectively did terminate it in June 2011" by laying off employees. Arbitrator relied on ALJ's examination of CBA, concluding ALJ correctly analyzed question of nature of agreement with respect to City's obligation to maintain staffing levels. To extent union's 20 grievance implicated 45, grievance was denied. Following arbitration of 20, union requested arbitration relating to 1 and 6. City refused to arbitrate, informing union res judicata and collateral estoppel precluded "rematch" on issues that were litigated before in 20. Circuit Court determined issue in grievance 6 had not been decided. Preclusion issue question to be decided by arbitrator. COA affirmed. Unless otherwise specified in CBA, whether arbitration is precluded under res judicata and collateral estoppel is for arbitrator to decide. Because CBA contained no indication res judicata and collateral estoppel should be addressed by court, rather than arbitrator, Circuit Court properly submitted matter to arbitration. COA offered no opinion on merits of city's preclusive arguments. City free to assert during arbitration that res judicata and collateral estoppel bar arbitration of 1 and 6. Should arbitrator reach merits of case, submitting matter to arbitration will not prevent City from asserting, after arbitration, there was impermissible conflict between MERC decision and arbitration decision.

Collateral estoppel from arbitration award?

Ric-Man Constr, Inc v Neyer, Tiseo & Hindo Ltd, 329159 (Jan 17, 2017), lv den ___ Mich ___ (2017). NTH contended Ric-Man was collaterally estopped from seeking lost profits because in its arbitration against OMIDDD, arbitration panel declined to award same lost profits to Ric-Man. Collateral estoppel applies to factual determinations made during arbitration. Circuit Court found issue decided by arbitration panel was not identical to that at issue in this case and collateral estoppel did not apply. Basis for arbitration panel's ruling is not entirely clear. Collateral estoppel applies only when basis of prior judgment can be clearly, definitely, and unequivocally ascertained. COA affirmed Circuit Court that collateral estoppel not applicable.

Scope of arbitration provision.

Shaya v City of Hamtramck, 328588 (Jan 5, 2017). Circuit Court held claims for employment discrimination under Civil Rights Act (CRA), MCL 37.2101 *et seq*., and retaliatory discharge under Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., subject to arbitration provision in employment agreement. COA reversed. Arbitration clause said, "Any controversy or claim arising out of or relating in any way to this agreement shall be settled exclusively by arbitration administered by [AAA] under its … National Rules for the Resolution of Employment Disputes … . This agreement to be submitted to binding arbitration specifically includes, but is not limited to, all claims that this agreement has been interpreted or enforced in a discriminatory manner. … ." COA stated arbitration clause, with respect to claims of CRA discrimination or WPA retaliatory discharge, to be valid only if (1) parties agreed to arbitrate such claims, (2) statutes in question do not prohibit agreement to arbitrate, and (3) agreement does not waive substantive rights and remedies of statute and the procedures are fair. COA held arbitration clause did not provide notice to plaintiff he was waiving right to adjudication of statutory discrimination claims, and plaintiff not on notice that terms of employment contract constituted waiver of right to bring statutory discrimination claim in court.

Award confirmed after lap top cleansing.

Santamauro v Pultegroup, Inc, 328404 (Dec 20, 2016). Plaintiff agreed to arbitrate claims arising from employment. He was discharged. He initiated arbitration alleging wrongful discharge. Arbitrator found plaintiff had deliberately spoiled evidence by removing hard drive of his Employer-owned laptop computer before returning it to company, and dismissed action. COA affirmed Circuit Court's confirmation of award.

Custody DRAA award confirmed.

Waterman v Waterman, 332537 (Dec 20, 2016). Defendant appealed JOD entered after defendant and plaintiff submitted dispute to arbitration. On appeal, defendant argued trial court and arbitrator both erred and errors warrant revisiting decisions concerning child custody, child support, and property. COA affirmed. Parties stipulated to arbitration of all issues, including child custody and parenting time. Although trial court has obligation to act in child's best interests and retains authority to vacate award that does not comport with best interests, MCL 600.5080(1), trial court does not have obligation to conduct its own evidentiary hearing.

Back-pay calculation after arbitration.

Harrison v Blue Cross Blue Shield of Mich, 328303 (Nov 29, 2016). Arbitrator found defendant violated CBA by discharging plaintiff. Arbitrator ordered reinstatement with 90 day unpaid suspension. Employer reinstated employee but issue arose concerning back-pay calculation and employee providing information to employer. Employee sued *pro per* concerning back-pay. Circuit Court dismissed suit. COA affirmed. COA held Circuit Court did not have subject-matter jurisdiction to hear plaintiff's case seeking

confirmation and enforcement of award. Only arbitrator can make determination that plaintiff seeks. Award did not contain amount of back pay or method in which to calculate the same. There is dispute concerning whether defendant is justified in not paying back pay without receiving what it deems necessary documentation and Circuit Court is in no position to resolve that factual dispute, or in calculating back pay. Circuit Court properly determined it lacked subject-matter jurisdiction.

Waiver.

Phillips v State Farm Ins Co, 329740 (Nov 17, 2016). COA was not definitely and firmly convinced Circuit Court made mistake when it found DeShano did not engage in litigation in a way inconsistent with its rights to arbitration. Circuit Court properly held DeShano had not waived its right to arbitration.

Labor arbitration award vacated.

Berrien Co v POLC, 328794 (Nov 15, 2016), affirmed vacatur of award. Union argued age discrimination claim arbitrable because County had agreed it would not exercise its management rights "in violation of any specific provision" in CBA. A specific provision of CBA was nondiscrimination clause. Thus, County agreed in CBA not to exercise its management right to transfer and assign employees in violation of nondiscrimination clause. However, this agreement by County did not render discrimination claim arbitrable. Claim should not go to arbitration if there is express provision excluding matter from arbitration. Although County agreed it would not exercise management right to transfer and assign employees in violation of nondiscrimination clause, parties also agreed matters which were exclusively reserved to management were not subject to grievance procedure. Because CBA expressly provided matters exclusively reserved to management were excluded from grievance procedure, and because Union did not dispute right to transfer and assign employees was matter exclusively reserved to management, Circuit Court did not err in holding Union's claim of age discrimination, which was based on failure to transfer, was not arbitrable.

Arbitrators' awards confirmed.

Karmanos v Compuware Corp, 327476 and 327712 (Oct 20, 2016), lv den ___ Mich ___ (2017), affirmed Circuit Court confirmation of unreasoned award of $16,500,000. COA said lack of reasoned award rendered it impossible to discern mental path leading to award; court may not review arbitrator's factual findings or decision on merits; court may not invade province of arbitrator to construe contracts; it is outside province of courts to engage in fact-intensive review of how arbitrator calculated values, or whether evidence arbitrator relied on was most reliable or credible evidence presented.

No COA appeal provision enforced.

Ruben v Badgett, 326717 (Oct 11, 2016), lv den ___ Mich ___ (2017). COA enforced no appellate appeal provision in arbitration agreement. Accord ***Kay Bee Kay Holding Co, LLC v PNC Bank, NA***, 327077 (November 8, 2016).

Asking for too much in confirmation motion.

Davis v State Farm Mut Auto Ins Co, 326126 (June 21, 2016), lv den ___ Mich ___ (2017). Plaintiff filed motion to confirm award and for entry of judgment and for case evaluation sanctions. UAA, MCL 691.1702. COA held Circuit Court properly denied plaintiff's request for entry of judgment that was not in amount of award and properly denied plaintiff's request for case evaluation sanctions.

MUAA does not apply.

Lansing Community College Chapter of Mich Ass'n for Higher Ed v Lansing Community College Bd of Trustees, 323902 (Jan 21, 2016). Because of date of arbitration demand, MUAA did not apply.

Res judicata.

Jackson-Phelps v Dipiero, 323132 (Dec 17, 2015). Prior arbitration award on related issues was res judicata.

Review of employer's termination decision.

Taylor v Spectrum Health Primary Care Partners, 323155 (Dec 10, 2015), lv den ___ Mich ___ (2016). Employer reserved for itself sole discretion to determine existence of "unethical behavior" justifying summary termination. Provided employer follows procedures in contract, plaintiff has no basis to dispute determination and possibility of review by arbitrator, like possibility of judicial review, is foreclosed. Since arbitrators derive authority from contract and arbitration agreement, they are bound to act within those terms. Employer's termination decision did not give rise to "dispute" and plaintiff cannot seek review of decision by arbitrator.

Court appointment of DRAA substitute arbitrator reversed.

Zelasko v Zelasko, 324514 (2015), lv den ___ Mich ___ (2016). Defendant appealed order appointing substitute arbitrator after agreed-upon arbitrator died. Same order denied defendant's request that interim arbitration orders be vacated. Indicating nothing in DRAA, MCL 600.5070 *et seq*., permits Circuit Court to appoint substitute arbitrator absent agreement of parties, COA reversed appointing of substitute arbitrator. COA agreed with Circuit Court there was no reason to disturb interim orders, which were either not contested or were affirmed by Circuit Court.

COA affirms arbitrator fee.

Plante & Moran, PLLC v Berris, 323562 (Nov 17, 2015). COA affirmed fee because prior award confirming award was collateral estoppel and arbitrator was protected by doctrine of arbitral immunity.

COA approves informal method of conducting DRAA arbitration.

Fadel v El-Akkari, 321931 (Oct 15, 2015). (DRAA). COA held Circuit Court acted within its discretion in revisiting its initial decision to vacate award. DRAA does not require arbitrator to hear live rebuttal testimony.

Race to the courthouse.

New River Constr, LLC v Nat'l Mgt & Preservation Svs, LLC, 324465 (July 21, 2015). COA held Circuit Court abused discretion when it denied motion to set aside default judgment. Plaintiff is bound to arbitrate its breach of contract claim and defendant would have been entitled to summary disposition on these matters.

COA confirms binding mediation award.

Cummings v Cummings, 318724 (May 19, 2015). Plaintiff appealed Circuit Court denying plaintiff's motion to vacate "binding mediation award." COA affirmed. COA held binding mediation is equivalent to arbitration and subject to same judicial review. Parties agreed to binding mediation, which like arbitration, does not require a certain degree of formality. Relief from untimely award was not warranted where appellant failed to allege what difference would have resulted from timely award. Cases where award was vacated due to *ex parte* communication involved violation of arbitration agreement prohibiting such conduct. Binding mediation agreement did not contain clause prohibiting *ex parte* communication. There is no indication mediator exceeded powers by acting beyond material terms of parties' contract. COA said "Plaintiff also asserts that the mediator badgered witnesses, but the only example he gives is that the mediator poked a witness with a pencil. While poking a witness with a pencil … is inappropriate, it does not show a concrete bias." COA said hearings were often hostile or aggressive. Although there were times where mediator's behavior was not indicative of "a good mediator" or professional, mediator did the best it could to control the situation it was presented with and keep calm when hearings became aggressive.

COA confirms award despite discovery and witness interview issues.

Perry v Portage Pub Sch Bd of Ed, 319170 (March 12, 2015), lv den ___ Mich ___ (2015). Plaintiff appealed Circuit Court denying plaintiff's motion to vacate. COA affirmed. Prior to arbitration, employer retained investigator who created report. Employee requested copy of report before arbitration hearing. Employer declined,

indicating it would provide report only if employee realized this would make report subject to public disclosure under Public Records Act. Employee asked authorization to interview potential employee witnesses. Employee did not request depositions. At arbitration hearing, employer used investigator as witness. Arbitrator issued award in favor of employer. Circuit Court refused to vacate. COA agreed with Circuit Court that (1) employer did not refuse to produce report but rather correctly conditioned production on realization of Public Records Act implications, and (2) employee could have used depositions to interview witnesses but chose not to.

Dismissal order to permit arbitration is not final appealable order.

ITT Water & Wastewater USA Inc v L D'Agostini & Sons, Inc, 319148 (March 10, 2015). Circuit Court entered stipulation and order of dismissal without prejudice. Order stated parties entered into arbitration and tolling agreement concerning their claims. Circuit Court retained jurisdiction over case and case could be reopened under MCR 3.602(I) upon party's motion "for purposes of confirming any award rendered pursuant to the arbitration agreement of the parties." Order stated it resolved last pending claim and closed case. Defendant appealed challenging Circuit Court's orders granting partial summary disposition in favor of plaintiff. COA held stipulated order of dismissal entered by Circuit Court pursuant to agreement to submit claim and counterclaim to arbitration was not appealable by right, and COA lacked jurisdiction over appeal. COA noted, after entry of judgment on award, defendant could challenge in appeal by right Circuit Court's orders granting partial summary disposition in favor of plaintiff.

Successors have to comply with arbitration clause.

Marjorie Brown Trust v Morgan Stanley Smith Barney, LLC, 317993 (Feb 5, 2015), lv den ___ Mich ___ (2015). Main issue was whether dispute over investment account subject to arbitration, as specified in account agreement, or whether dispute can proceed in court. Plaintiff admitted account with Smith Barney was subject to arbitration agreement, but asserted defendants Morgan Stanley and Citigroup Global were not successors to Smith Barney, and were not parties to arbitration agreement. Defendants produced evidence that Morgan Stanley and Citigroup Global were successors of Smith Barney, through consolidations. COA agreed with Circuit Court that defendants were successors and agreement to arbitrate binding on plaintiff.

Labor arbitration award *res judicata* in subsequent court proceeding.

Heffelfinger v Bad Axe Pub Schs, 318347 (Dec 2, 2014), lv den ___ Mich ___ (2015). Teacher separated pursuant to Last Chance Agreement. LCA said separation could be arbitrated. Separation issue arbitrated. Arbitrator upheld separation. Teacher filed court action arguing LCA violated Teachers' Tenure Act, MCL 38.71 *et seq*. COA held award *res judicata* and precluded teacher's court case. ***Thomas v Miller Canfield Paddock & Stone***, 314374 (October 21, 2014), held collateral estoppel applied to positions taken in prior arbitration.

Past practice issues go to arbitration.

Wayne Co v AFSCME, 312708 (Oct 9, 2014). COA held, if CBA covers term or condition in dispute, enforceability of provision is left to arbitration. CBA grievance and arbitration procedures were bypassed. Scope of MERC's authority in reviewing claim of refusal-to-bargain when parties have grievance or arbitration process is limited to whether CBA covers subject of claim. When there is evidence that past practice has modified CBA, it is for arbitrator to make determination on issue, not MERC. See ***Macomb Co v AFSCME***, 494 Mich 65; 833 NW2d 225 (2013).

USAF pension consideration in DRAA arbitration.

Torres v Torres, 314453 (Aug 19, 2014) (Gleicher and O'Connell [majority]; and Hoekstra [dissent]), lv den ___ Mich ___ (2015). Parties submitted divorce case to arbitration. Evidence submitted to arbitrator revealed husband was entitled to USAF pension. Arbitrator's initial award overlooked USAF pension. When wife brought this omission to arbitrator's attention, he acknowledged existence of unvested pension but refused to value or equitably divide it. As a result, award on its face improperly treated pension as husband's separate property. COA reversed Circuit Court's affirmance of award and remanded for reconsideration of the pension distribution.

Award from hearing with one party absent confirmed.

Blue River Fin Group, Inc v Elevator Concepts Ltd, 315971 (July 29, 2014); and ***Elevator Concepts Ltd v Blue River Fin Group, Inc***, 314803 (July 29, 2014). Arbitration hearing took place. Defendants did not attend. There was no answer or response to plaintiff's demand for arbitration. There was no transcript. Arbitrator issued award in favor of plaintiff. Plaintiff filed motion to enforce award. Defendants argued there was no agreement to arbitrate, and arbitrator had no authority to issue award. Plaintiff contended defendants waived any challenge to award because they never objected to plaintiff's demand for arbitration. Circuit Court granted plaintiff's motion to enforce award. COA affirmed and said that to determine arbitrability, court must consider whether there is arbitration provision in parties' contract, whether dispute is arguably within arbitration clause, and whether dispute is expressly exempt from arbitration by terms of contract, and doubts about arbitrability are resolved in favor of arbitration. COA said court may not hunt for errors in award, and facially valid damage award should not be disturbed.

Arbitrator failed to comply with arbitration agreement.

Visser v Visser, 314185 (July 15, 2014). Parties agreed to DRAA arbitration to resolve issues relating to custody, parenting time, child support, and property. Parties agreed, pursuant to MCL 600.5077(2), if custody, child support, or parenting time were at issue, court reporter would be hired to transcribe portion of arbitration proceedings affecting those issues. They agreed arbitrator must adhere to MRE. After successfully

mediating custody and parenting time issues, arbitration was held to decide child support and property issues. Without presence of court reporter, and without adhering to MRE, arbitrator entered award and proposed judgment. Defendant argued arbitrator exceeded authority in failing to apply MRE and failing to hire court reporter. Circuit Court ruled in favor of plaintiff, entered arbitrator's proposed judgment, and denied defendant's motion to vacate award. COA held because of arbitrator's failure to comply with arbitration agreement by neither utilizing MRE nor obtaining court reporter, Circuit Court erred in refusing to vacate provision of award and proposed judgment concerning child support.

Does arbitrator or Court decide sanctions issue?

G&B II, PC v Gudeman, 315607 (July 15, 2014), lv den ___ Mich ___ (2015). Attorney-fee dispute resulted in arbitration, where parties negotiated payment plan. Plaintiff returned to Circuit Court seeking sanctions against defendant's counsel, contending counsel's defense was frivolous. Circuit Court denied sanctions, ruling it should have been directed to arbitrator. COA affirmed, for reasons different than those used by Circuit Court. Plaintiff could have sought sanctions in arbitration. It did not. Given brief time Circuit Court conducted underlying action, COA declined to disturb Circuit Court conclusion it could not reasonably assess sanction. Arbitration agreement gave arbitrator authority to resolve disagreement between parties "in connection with, or in relation to this Agreement, or otherwise." Imposition of sanctions in arbitration for attorney misconduct during arbitration proceedings is consistent with arbitration agreement, broad powers granted to arbitrators, and court rules. AAA Rules governing commercial arbitration do not prohibit sanctioning attorney for frivolous defense. AAA, Commercial Arbitration Rules, R-58(a). Regardless of arbitrator's power to sanction attorney, Circuit Court did not clearly err by refusing to do so.

Court must resolve dispute regarding validity of arbitration agreement.

Queller v Young and Meather Props, LLC, 315862 (June 17, 2014). Circuit Court granted defendant's motion to compel arbitration. Circuit Court determined that alleged fraud in the inducement claim could be raised in arbitration. COA reversed. According to COA, before court can order party to arbitration, court must resolve dispute regarding validity of underlying agreement; existence of arbitration agreement and enforceability of its terms are questions for court, not arbitrator.

CBA must be exhausted before court action.

Gliwa v Lenawee Co, 313958 (May 27, 2014), concerned termination of plaintiff's employment. Defendants appealed Circuit Court order denying their motion for summary disposition. COA reversed. According to COA, Circuit Court erred by failing to grant summary disposition in favor of defendants on plaintiff's claims of wrongful discharge; plaintiff's position was in collective bargaining unit; he was bound by CBA; and his failure to utilize CBA grievance procedure required summary disposition in favor of

defendants. Where CBA mandates internal remedies be pursued, party must exhaust those remedies before filing court action.

COA reverses Circuit Court order to disqualify arbitrator.

Thomas v City of Flint, 314212 (April 22, 2014) (Donofrio and Cavanagh [majority]; Jensen [concurring]. During course of pending arbitration, neutral arbitrator inadvertently sent e-mail to plaintiff's counsel that was intended for one of arbitrator's own clients. Plaintiff's counsel then requested neutral arbitrator to recuse herself and she declined. Circuit Court granted plaintiff's motion to disqualify neutral arbitrator. Plaintiff appealed. COA said arbitrator should be disqualified if, based on objective and reasonable perceptions, arbitrator has serious risk of actual bias, appearance of impropriety standard is applicable to arbitrators; and arbitrators are not judges and are not subject to Code of Judicial Conduct. Unintentional e-mail did not give rise to objective and reasonable perception that serious risk of actual bias existed. MCR 2.003(C)(1)(b). COA reversed order granting plaintiff's motion to disqualify.

Concurrence said, if plaintiff wished to challenge impartiality of neutral arbitrator, he was required to wait until after award was issued.

COA reverses Circuit Court confirmation of award.

Rogensues v Weldmation, Inc, 310389 and 311211 (Feb 11, 2014), lv den ___ Mich ___ (2014). Defendant appealed Circuit Court judgment confirming award. COA held Circuit Court erred in confirming award and defendant did not enter into arbitration agreement with plaintiff and was not bound by employment agreement plaintiff had with defendant. Defendant not required to file motion to vacate award under MCR 3.602(J) in order to defend against confirmation of award. Circuit Court erroneously failed to consider defendant's defense that no arbitration agreement existed before confirming award. Defendant not required to arbitrate dispute plaintiff had with defendant. Arbitrator exceeded authority when she concluded defendant was bound by plaintiff's employment agreement to arbitrate plaintiff's claim that he was entitled to a severance payment.

COA affirms Circuit Court vacatur of awards.

In ***AFSCME v Charter Twp of Harrison***, 312541 (Jan 16, 2014), COA affirmed Circuit Court vacatur of arbitration award. CBA provided in event that either party fails to answer or appeal within time limits, grievance will be considered decided in favor of opposite party. Employer failed to answer grievance within required time limits, but award did not decide grievance in AFSCME's favor. According to COA, this was erroneous. Employer's failure to timely respond to grievance triggered default provision.

Cannot compel arbitration by non-signatory.

Ric-Man Constr Inc v Neyer, Tiseo & Hindo Ltd, 309217 (March 26, 2013). Circuit Court erred by concluding defendant had right to compel arbitration, based on plaintiff's arbitration agreement with a third entity. Although arbitration is favored by

public policy as means for resolving disputes, arbitration is voluntary, and party cannot be required to arbitrate dispute which it has not agreed to arbitrate.

Arbitration award can be *res judicata* in subsequent lawsuit.

Sloan v Madison Heights, 307580 (March 21, 2013). COA affirmed Circuit Court ruling that prior award was *res judicata* on issue of whether City had unilateral right to change retiree insurance carriers. Grievances were based on CBA language that was substantially similar to language contained in plaintiffs' CBAs. A substantial identity of interests existed between retirees represented by former union and those represented by present union. Plaintiffs' interests were presented and protected in the arbitration.

Arbitrator cannot render "default" award without a hearing.

Hernandez v Gaucho, LLC, 307544 (Feb 19, 2013). Parties arbitrated employment claim. Arbitrator ruled in favor of employee. Award based on default of employer, who failed to provide discovery during arbitration. Arbitrator did not conduct hearing, hear testimony, or take proofs. Employee moved to confirm award and defendants moved to vacate. Circuit Court concerned arbitrator never took evidence and there were *ex parte* communications between arbitrator and attorneys. Circuit Court granted motion to vacate and denied motion to confirm. COA affirmed. COA said arbitrator can hear testimony, take evidence, and issue award in absence of one of parties if that party, although on notice, has defaulted or failed to appear. Arbitrator may not issue award solely on basis of default, but must take evidence from non-defaulting party to justify award. Uniform Arbitration Act provides, even when arbitrator is entitled to proceed in absence of defaulting party, arbitrator required to "hear and decide the controversy on the evidence … ." MCL 691.1695(3).

Rule 31, AAA Commercial Arbitration Rules (Oct 1, 2013); Rule 29, AAA Employment Arbitration Rules (November 1, 2009); and Rule 26, AAA Labor Arbitration Rules (July 1, 2013), state:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

Rule 12603, FINRA Code of Arbitration for Customer Disputes (April 16, 2007), and Rule 13603, FINRA Code of Arbitration for Industry Disputes (April 16, 2007), state:

> If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

Successor to arbitration agreement must prove it is successor.

Brown v Morgan Stanley Smith Barney, 307849 (Feb 19, 2013). In customer against brokerage firm case, issue was whether agreement to arbitrate customer had signed with non-party prior brokerage firm inured to benefit of defendant brokerage firm. COA found no evidence which definitively explained relationship, if any, between defendants and Smith Barney Inc. or Smith Barney Shearson Inc. According to COA, brokerage firm was not entitled to order compelling arbitration. This case shows, if a party argues arbitration agreement with another entity inures to the party's benefit, it should have a clear paper trail showing relationship between party and other entity.

Effect of union not taking case to CBA arbitration.

Kucmierz v Dep't of Corrections, 309247 (Feb 12, 2013). Employee brought lawsuit against employer arguing discharge of employee was improper. Parties stipulated to dismiss court case so entities could go to CBA arbitration between union and employer. Union eventually decided not to take matter to arbitration and there was no arbitration. Employee moved to set aside dismissal of court case. Circuit Court set aside dismissal. COA reversed. Employee alleged parties had mistaken belief that union was going to arbitrate case. Stipulation and order provided that parties agreed to dismiss proceeding with prejudice because it was subject of agreement to arbitrate. Stipulation did not provide matter would be arbitrated or that dismissal was contingent on arbitration occurring. Nothing in stipulation precluded union and employer from reaching settlement agreement to avoid arbitration. Employee failed to show mutual mistake occurred and he was not entitled to relief from dismissal order.

Party did not waive objection to arbitration by participating in arbitration.

Fuego Grill, LCC v Domestic Uniform Rental, 303763 (Jan 22, 2013) (Markey [dissent]), lv den, ___ Mich ___ (2013). Issue was whether Circuit Court erred in concluding there was not an agreement to arbitrate between parties. Plaintiff did not waive issue of arbitrability through participation in arbitration, as it argued during arbitration that no contract existed and, before award was issued, it filed complaint in Circuit Court seeking to preclude arbitration because no contract to arbitrate existed. Absence of valid agreement to arbitrate is defense to action to confirm award. It is for court, not arbitrator, to determine whether agreement to arbitrate exists.

Judge Markey's dissent concluded that on basis of Michigan's policy favoring arbitration and because plaintiff's claims were within scope of arbitration clause that plaintiff signed, that plaintiff may not relitigate its fact-based defenses in Circuit Court.

Three-year limitation precludes claim and arbitration.

Krueger v Auto Club Ins Assn, 306472 (Jan 8, 2013). Arbitration agreement required arbitration demand be filed within three years from date of accident or insurer will not pay damages. Insured did not file arbitration demand within three years of accident. Insured argued three years did not start until insurer communicated it was denying the claim. According to COA, policy required arbitration demand be filed within

three years of accident, and such language does not bar insured from filing arbitration demand in order to comply with three year time limitation even if disagreement has not yet arisen. Arbitration demand was untimely.

Arbitration PTO award vacated.

MSX Int'l Platform Servs, LLC v Hurley, 300569 (May 22, 2012) (Owens, Jansen [dissent], and Markey), lv den ___ Mich ___ (2012), reversed Circuit Court's denial of motion to vacate award. Issue was whether employer's written PTO policy granted employee vested right to PTO. COA found nothing that supported notion of express contract or agreement concerning compensation for PTO; and there was no basis for finding there was contract or agreement that entitled employee to PTO. Judge Jansen dissented, stating whether arbitrator's interpretation of contract is wrong is irrelevant.

Another strict interpretation of arbitration agreement issue submission.

Cohen v Park West Galleries, Inc, 302746 (April 5, 2012), lv den ___ Mich ___ (2012). Plaintiffs appealed Circuit Court's ruling that all of plaintiffs' claims were subject to arbitration agreement. COA held only claims subject to arbitration were those arising from agreements containing an arbitration clause. Michigan law generally requires that separate contracts be treated separately, and language of agreements that contained arbitration clause did not reference past purchases.

Non-signatories sometimes subject to arbitration agreement.

Tobel v AXA Equitable Life Ins Co, 298129 (Feb 21, 2012), affirmed Circuit Court order compelling plaintiffs to submit claims to arbitration. Because parties performed under terms of agreements, plaintiffs could not avoid terms of agreements on ground that promises made at beginning of agreements rendered agreements illusory. Non-signatories may be bound by arbitration agreement based on estoppel where they are seeking benefit from contract while trying to disavow arbitration provision.

Pre-existing tort claim commenced after domestic relations arbitration.

Chabiaa v Aljoris, 300390 (Feb 21, 2012). Under DRAA agreement, arbitrator was to decide property division and support. After arbitration, Circuit Court entered judgment pursuant to award. Judgment provided it resolved all pending claims and closed case. Subsequently, plaintiff filed assault and battery complaint against defendant for events that preceded arbitration. According to COA, arbitration agreement did not include resolution of tort claims, and assault and battery cause of action could be brought in separate proceeding after domestic relations case and arbitration.

Arbitration submission language again strictly interpreted.

Midwest Mem Group, LLC v Singer, 301861, 301883 (Feb 14, 2012), lv den ___ Mich ___ (2012). Defendants appealed Circuit Court order denying their motions to compel arbitration. Defendants maintained that language of arbitration provisions covered plaintiffs' allegations. COA in convoluted and complicated opinion affirmed Circuit Court ruling arbitration clauses did not cover controversy at issue.

Party did not waive right to arbitration.

Flint Auto Auction, Inc v The William B Williams Sr Trust, 299552 (Nov 22, 2011). Party is prejudiced by inconsistent acts of other party when it has expended resources to litigate merits of case. Plaintiff argued it expended resources due to defendants' discovery requests. Defendants argued plaintiff's burden was minimal. COA said party must expend more than just some time and resources to constitute sufficient prejudice. While plaintiff expended some effort responding to discovery requests, it had not exerted level of effort COA had previously found to require waiver. In light of public policy favoring arbitration, plaintiff had not satisfied its burden of establishing waiver.

Order to compel arbitration vacated.

Gardella Homes, Inc v LaHood-Sarkis, 298332 (Oct 11, 2011). Construing releases in modification agreement with promissory note, COA held Circuit Court erred in holding that note was subject to arbitration. Engrafting arbitration clause onto note would contravene parties' intent to settle matter with a payment obligation that was not subject to defenses or counterclaims. Because note did not contain arbitration clause, COA vacated Circuit Court's arbitration order.

Second union can be necessary party to labor arbitration.

Macomb Co v POAM, 299436 (Sep 20, 2011), involved dispute between County, POAM, and MCPDSA regarding call-in priority. Arbitrator issued award in favor of POAM holding there had been no violation of POAM's CBA, and call-in procedures were binding past-practice. COA concluded MCPDSA was necessary party to litigation. MCPDSA's CBA addressed call-in procedures, and arbitrator's jurisdiction could not extend to deciding terms of MCPDSA's CBA without MCPDSA being added as party to arbitration. To properly interpret POAM's CBA, necessary for arbitrator to consider other related CBAs. Because COA found MCPDSA necessary party to arbitration, it vacated Circuit Court order and remanded to arbitrator for further proceedings.

Party should have raised case evaluation issue with arbitrator.

J L Judge Constr Services v Trinity Electric, Inc, 295783 (Aug 2, 2011). After case evaluation, parties agreed to arbitration. Defendants prevailed in arbitration so as to be arguably entitled to case evaluation costs. Instead of requesting these costs from arbitrator, defendants requested them from Circuit Court. AAA rules provided that award may include attorneys' fees if authorized by law and arbitrator was entitled to assess fees. Despite authority to grant attorney fees, arbitrator held parties were to bear their own fees. COA said defendants should have submitted attorney fee issue to arbitrator.

Non-party cannot filed motion concerning arbitration award.

Dubuc v Dep't of Env Quality, 298712 (July 14, 2011). Non-party attorney filed motion to modify award. Circuit Court granted motion. COA vacated Circuit Court indicating it was impermissible for non-party to file motion.

Arbitration issue submission language strictly interpreted.

Hantz Group, Inc v Van Duyn, 294699 (June 30, 2011). Plaintiffs alleged violations of non-solicitation agreements with defendant former-employees. COA ruled Circuit Court erred in ordering arbitration. Non-solicitation agreements did not contain arbitration clauses. Only agreement to arbitrate was based on FINRA membership, and plaintiffs had not agreed to arbitrate claims arising out of non-solicitation agreements.

Arbitration remedy may preclude MERC order.

Flint v POLC, 295913 (April 14, 2011), reversed MERC order in favor of charging parties. Flint argued MERC should have dismissed ULP charges on basis of CBA arbitration provisions. COA agreed matter covered by CBA arbitration provisions. COA vacated MERC order and remanded for further proceedings consistent. On remand, it is MERC's responsibility to determine if alleged ULPs should be dismissed.

Federal Arbitration Act does not allow appeal of order to state court.

Midwest Memorial Group LLC v Citigroup Global Markets, Inc, 301867 (March 18, 2011), Federal Arbitration Act, 9 USC 1 *et seq*, case, held 9 USC 16(a)(1)(B) does not create right to appeal state court order denying arbitration to state appellate court. It only provides for appeal from order denying petition to order arbitration under 9 USC 4. 9 USC 4 only allows for petitions for arbitration to United States District Court.

Individual supervisor not covered by arbitration agreement.

Riley v Ennis, 290510 (Feb 25, 2010), lv den ___ Mich ___ (2010). Plaintiff brought employment discrimination case against only individual supervisor. Defendant moved to dismiss because of arbitration agreement between plaintiff and non-party corporate employer. Circuit Court granted motion to dismiss. COA reversed, indicating although defendant signed employment contract, contract specified he did so "For the Agency." According to COA, corporation can only act through its officers and agents. Arbitration agreement applicable to corporate employer but not to individual supervisor.

Arbitration agreement may benefit non-signatory.

Lyddy v Dow Chemical Co, 290052 (Jan 19, 2010). Terms of arbitration agreement, incorporating claims against any entity for whom or with whom GSI had done or might be doing work during time of employment, precluded plaintiff's suit against Dow. The issue was whether plaintiff's agreement with GSI required plaintiff to arbitrate his claims against Dow. COA held, in certain instances, arbitration agreement may extend to persons who were not parties to agreement.

Labor arbitration retained jurisdiction supplemental award partially vacated.

POAM v Leelanau Co, 285132 (Nov 10, 2009). COA partially vacated and partially confirmed labor arbitration award. Arbitrator ruled no just cause to terminate Deputy. Arbitrator required fitness for duty examination; and retained jurisdiction to resolve issues concerning implementation. Circuit Court refused to vacate reinstatement order, but held arbitrator exceeded authority by retaining jurisdiction providing for fitness for duty examination. COA basically affirmed Circuit Court. Article 6(E)(1)(a) of Code of Professional Responsibility for Arbitrators of Labor-Management Disputes: "Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party … ." Elkouri & Elkouri, *How Arbitration Works*, 6th Ed, pp 333-337; *CUNA Mut Ins Soc'y v Office & Prof'l Employees*, 443 F3d 556 (7th Cir 2006). Elkouri & Elkouri, p 1219: "The modern view is that the award of interest is within the inherent power of an arbitrator, and in fashioning a 'make-whole' remedy it appears that a growing number of arbitrators are willing to exercise the discretion to award interest where appropriate." COA did not discuss Code of Professional Responsibility for Arbitrators of Labor-Management Disputes or other authority concerning arbitrator retaining jurisdiction.

https://www.courts.michigan.gov/497176/siteassets/case-documents/uploads/opinions/final/coa/20091110_c285132_33_285132.opn.pdf

Labor arbitration award involving lay-off return vacated.

City of Frankfort v POAM, 286523 (Sep 15, 2009). City hired new employee rather than recall employee from layoff. Issue was whether laid off employee had recall rights in light of new CBA language. In split decision, COA vacated award and remanded to arbitrator. Dissent said, if arbitrator erred, arbitrator was interpreting CBA. Majority distinguished *Mich Family Res, Inc v SEIU*, 475 F3d 746 (6th Cir 2007)(en banc). *Mich* discusses standard for reviewing labor arbitration awards. In *Mich*, Union appealed District Court vacating award. Sixth Circuit reversed because arbitrator acting within scope of authority, company had not accused arbitrator with fraud or dishonesty, arbitrator was arguably construing CBA, and company had shown no more than arbitrator made error in interpreting CBA. *Mich* said following should be looked at in deciding whether to vacate labor arbitration award. Did arbitrator act outside authority by resolving dispute not committed to arbitration? Did arbitrator commit fraud, have conflict of interest or act dishonestly in issuing award? In resolving legal or factual disputes, was arbitrator arguably construing or applying CBA? As long as arbitrator does not offend any of these requirements, request for judicial intervention should be denied even though arbitrator made serious, improvident, or silly errors. Arbitrator exceeds authority only when CBA does not commit dispute to arbitration.

Evaluation notification labor arbitration award vacated.

Northville Ed Ass'n v Northville Pub Schs, 287076 (Aug 20, 2009), vacated labor arbitration award and remanded case to arbitrator. CBA required teacher be given notification of eligibility for evaluation. Because teacher was on maternity leave at time notification would have been given, Employer did not give notification. Teacher was given less favorable evaluation method. Teacher grieved arguing she should have received notification of more favorable evaluation. Arbitrator denied grievance. According to arbitrator, teacher knew about evaluation option because of her prior participation in it, and she was "estopped" from complaining about non-notification. Circuit Court said arbitrator added term to CBA and exceeded authority. Estoppel inapplicable because CBA did not permit equitable considerations of "estoppel."

COA rejects arbitration of post-CBA term grievance.

Grand Rapids Employees Ind Union v Grand Rapids, 280360 (Oct 16, 2008), lv den ___ Mich ___ (2009). Union cannot arbitrate grievances where CBA excludes arbitration when administrative action is filed on same matter.

COA affirms Circuit Court orders favoring arbitration.

In the following cases, COA affirmed orders ordering arbitration, confirming awards, or declining to vacate awards. ***Lilley v GL Southfield***, 340784 (Feb 28, 2019); ***Newman v Suburban Mobility Auth***, 342678 (Jan 15, 2019); ***AFSCME v Wayne Co***, 337964 (Sep 30, 2018); ***Oliver v Kresch***, 338296 (July 19, 2018); ***Roetken v Roetken***, 333029 (Dec 19, 2017), lv den ___ Mich ___ (2018); ***Young v Burton***, 334231 (Dec 19, 2017); ***Shea v FCA US***, 333588 (Oct 17, 2017); ***Spence Bros v Kirby Steel***, 329228 (March 14, 2017); ***CNJ Financial v McKenney***, 327547 (Oct 19, 2016); ***McCarthy v Pallisco***, 327647 (Oct 6, 2016), lv den ___ Mich ___ (2017); ***Compatible Laser Products v Main Street Financial Supplies***, 323122 (Sep 20, 2016); ***William Beaumont Hosp v West Bloomfield MOB***, 327238 (July 26, 2016); ***Francis v Kayal***, 325576 (May 3, 2016); ***LaSalle Bank Midwest v Jar Inv Group***, 324849 (April 28, 2016); ***Ingham Co v MAOP***, 325633 (April 19, 2016); ***Gordon v Cornerstone PG***, 324909 (March 8, 2016); ***O'Neil v O'Neil***, 324290 (Feb 11, 2016); ***Fadel v El-Akkari***, 321931 (Oct 15, 2015); ***Hartigan v The Gold Refinery***, 321506 (Oct 1, 2015); ***Ellis v Ellis***, 321972 (Aug 6, 2015); ***Martinez v Degiulio***, 321616 (July 30, 2015) (DRAA); ***Fremont Comm Digester v Demoria Bldg Co***, 320336 (June 25, 2015); ***Bidasaria v CMU***, 319596 (May 14, 2015); ***Andary v Andary,*** 319299 (Feb 10, 2015); ***Warren v Flint Community Schs***, 318825 (Jan 15, 2015); ***Wyandotte v POAM***, 318563 (Janu 13, 2015); ***Lowry v Lauren Bienenstock & Associates***, 317516 (Dec 23, 2014); ***McAlpine v Donald A Bosco Bldg***, 316323 (Dec 18, 2014); ***Theater Group 3 v Secura Ins***, 317393 (Nov 13, 2014); ***Mastech v Bleichert***, 317467 (Nov 13, 2014); ***Israel v Putrus ,*** 316249 (Nov 4, 2014); ***Ross v Ross***, 319576 (Sep 24, 2014); ***C&L Ward Bros v Outsource Solutions***, 315794 (Sep 2, 2014); ***Roty v Quality Rental***, 313056 (Aug 12, 2014); ***Brown v Titan Ins***, 315119 (July 24, 2014); ***Kosiur v Kosiur***, 314841 (April 22, 2014); ***Emrick v Menard Builders***, 314038 (April 17, 2014); ***Pugh v Crowley***, 313471 (April 8, 2014); ***Hillsdale***

Co Medicare Care and Rehab Ctr v SEIU, 310024 (April 22, 2014); ***Command Officers v Sterling Heights***, 310977 (Dec17, 2013); ***Taylor v Great Lakes Casualty Ins***, 308213 (September 19, 2013); ***Mager v Giarmarco, Mullins & Horton***, 309235 (June 25, 2013); ***Holland v French***, 309367 (June 18, 2013); ***Yacisen v Woolery***, 308310 (May 30, 2013); ***Platt v Berris***, 297292 and 298872 (April 23, 2013); ***Derwoed v Wyandotte***, 308051 (April 16, 2013); ***California Charley's Corp v Allen Park***, 295575, 295579 (April 9, 2013); ***Herman J Anderson, PLLC v Christ Liberty Ministry***, 307931 (March 14, 2013); ***Haddad v KC Property Service***, 306548 (Feb 21, 2013); ***Detroit v DPOA***, 306474 (Feb 12, 2013); ***Suchyta v Suchyta***, 306551 (Dec 11, 2012); ***James D Campo v Trevis***, 305112 (Dec 4, 2012); ***Wendy Sabo & Assoc's v Am Assoc's,*** 305575 (Dec 4, 2012); ***Rouleau v Orchard, Hiltz and McCliment***, 308151 (Oct 25, 2012); ***Vandekerckhoue v Scarfore***, 301310 (Oct 11, 2012); ***Bies-Rice v Rice***, 295631, 295634, 300271 (Sep 4, 2012) , lv den, ___ Mich ___ (2013); ***Piontkowski v Marvin S Taylor, DDS,*** 303963 (July 10, 2012); ***Kutz v Kutz***, 300864 (May 1, 2012); ***Turkal v Schartz***, 303574 (April 17, 2012); ***MacNeil v MacNeil***, 301849 (March 15, 2012); ***Leverett v Delta Twp***, 302557 (March 15, 2012); ***Olabi v Alwerfalli and Mfg Eng Solutions***, 300541 March 13, 2012); ***Suszek v Suszek***, 299167 (Feb 28, 2012); ***Armstrong v Rakecky***, 301423 (Feb 21, 2012)*; **Hantz Financial Services v Monroe***, 301924 (Jan 24, 2012); ***CCS v IWI Ventures***, 300940 (Jan 24, 2012); ***Frankfort v POAM***, 298307 (Oct 18, 2011), lv den ___ Mich ___ (2012); ***McDonald Ford v Citizens Bank***, 296814, 299324 (Sep 27, 2011); ***Bird v Oram***, 298288 (Sep 27, 2011); ***Souden v Souden***, 297676, 297677, 297678 (Sep 20, 2011); ***Reynolds v Parklane Investments***, 298777 (Sep 20, 2011); ***POAM v Lake Co***, 298055 (Aug 11, 2011); ***Oakland Co v Deputy Sheriffs***, 297022 (Aug 9, 2011)*; **J L Judge Constr Services v Trinity Electric***, 295783 (Aug 2, 2011); ***Cumberland Valley Ass'n v Antosz***, 294799 (May 26, 2011); ***Roosevelt Park v Police Officers***, 295588 (May 12, 2011) , lv den___ Mich ___ (2011); ***Schroeder v Muller Weingarten Corp***, 296420 (April 26, 2011); ***WHRJ v Taylor***, 295299 (March 29, 2011); ***Wilson Motors v Credit Acceptance***, 295409 (March 22, 2011); ***Smaza v ARS Investments***, 293933 (March 15, 2011); ***Sharonann v WHIC***, 295800 (March 10, 2011); ***DPOA v Detroit***, 293510 (Feb 15, 2011); ***Nat'l Env Group v Landfill Avoidance Sys***, 292454 (Jan 20, 2011); ***Kulongowski v Brower***, 293996 (Nov 9, 2010); ***Select Constr v LaSalle Group***, 293143 (Nov 2, 2010); ***Merkel v Lincoln Schs***, 292795 (Oct 19, 2010); ***Cipriano v Cipriano***, 289 Mich App 361; 808 NW2d 230 (2010), lv den ___ Mich ___ (2012); ***Nordlund & Assoc v Hesperia***, 288 Mich App 222; 792 NW2d 59 (2010); ***Putruss v O'halloran Trust***, 291160 (Aug 5, 2010); ***EnGenius, Inc v Ford Motor***, 290682 (July 29, 2010); lv gtd, 488 Mich 1052; 794 NW2d 615 (2011); ***Realty v MLP Enterprises***, 289598 (June 17, 2010); ***Joseph Chevrolet v Hunt***, 290882 (June 8, 2010); ***Gonzalez v Ecopro Recycling***, 285376 (April 22, 2010); ***Rubenfaer v PHC of Mich***, 289044 (April 20, 2010); ***Crowley v Crowley***, 288888 (April 15, 2010); ***Pontiac v Firefighters***, 289866 (March 18, 2010); ***CMU Faculty v CMU***, 293003 (Feb 10, 2010); ***Center Line v Police Officers***, 289248 (Feb 9, 2010); ***Considine v Considine***, 283298 (December 15, 2009); ***Healey v Spoelstra***, 281686, 288223 (Oct 22, 2009); ***Washington v Washington***, 283 Mich App 667; 770 NW2d 908 (2009); ***Harleysville Lake States Ins v Kangas***, 282500 (April 21, 2009); ***MAOP v Pontiac***, 281353 (March 26, 2009); ***Pontiac v MAOP***, 280919 (Feb 19, 2009); and ***Mehl v Fifth Third***, 278977 (Dec 11, 2008).

Lee Hornberger is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Michigan, Editor Emeritus of *The Michigan Dispute Resolution Journal*, former member of the State Bar's Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation. He is also a Fellow of the Michigan State Bar Foundation.

He has received the Distinguished Service Award from the State Bar's ADR Section in recognition of significant contributions to the field of dispute resolution. He has received the George Bashara Award from the ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from the ADR Section.

###